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REPORTS
 OF
CASES ARGUED AND DETERMINED
 IN THE
Supreme Court of Judicature
 OF THE
STATE OF INDIANA,

**WITH TABLES OF THE CASES REPORTED AND CASES
 CITED AND STATUTES CITED AND CONSTRUED
 AND AN INDEX.**

By SIDNEY R. MOON,
OFFICIAL REPORTER.

DANIEL W. CROCKETT, First Ass't Reporter.
LEE W. MOON, Second Ass't Reporter.

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JUDGES
OF THE
SUPREME COURT

OF THE
STATE OF INDIANA,

DURING THE TIME OF THESE REPORTS.

HON. LEONARD J. HACKNEY.* †
HON. LEANDER J. MONKS. ‡
HON. JAMES H. JORDAN. ‡
HON. JAMES McCABE. †
HON. TIMOTHY E. HOWARD. †

* Chief Justice at November Term, 1895.

† Term of office commenced January 1, 1893.

‡ Term of office commenced January 7, 1895.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
ALEXANDER HESS.

SHERIFF,
DANIEL ROACH.

LIBRARIAN,
JOHN C. McNUTT.

CASES
ARGUED AND DETERMINED
IN THE
Supreme Court of Judicature
OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1895, IN THE EIGHTIETH
YEAR OF THE STATE.

No. 16,996.

WILKINS ET AL. v. YOUNG ET AL.

144	1
4164	87
144	1
166	358

DEED.—Construction.—Joint Tenancy.—Tenancy by Entirety.—

Where a deed conveying land to a husband and wife contains the stipulation, "To have and hold the same to the said Samuel Gordon and Phoebe Gordon, his wife, *in joint tenancy*, their heirs and assigns forever," the conveyance vests an estate in joint tenancy in the husband and wife, and they do not hold as tenants by entirety; the latter part of the phrase, "their heirs and assigns forever," being superfluous and in no way affecting the meaning or intent of the grantor.

SAME.—Construction.—No Ambiguity.—Understanding of Parties.—

What the grantor or grantees of a deed understood by the terms of a deed, or in what manner they subsequently treated it, has no bearing on its construction, where there is no ambiguity in the deed.

WILL.—Interest of Joint Tenant not Descendible.—The interest of a

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joint tenant not being descendible, such tenant has no right or power, under section 2726, R. S. 1894 (section 2556, R. S. 1881), to devise the same by will.

MORTGAGE.—Joint Tenancy.—The joint tenant may mortgage his interest in the joint estate in like manner as though he were a tenant in common, and to the extent of the mortgage lien the right of the survivor will be destroyed, and the equity of redemption at the death of the tenant will be all that will fall to the surviving companions.

HARMLESS ERROR.—Ultimate Judgment Right.—Intervening errors will be deemed harmless, where the ultimate judgment is right.

From the Allen Circuit Court.

W. G. Colerick and *M. V. B. Spencer*, for appellees.

S. M. Hench and *H. C. Hartman*, for appellants.

JORDAN, J.—Action by appellees in the lower court, wherein they sought to recover the possession of certain described real estate from the appellant, John H. Wilkins, and to quiet their title thereto against both of the appellants. A trial resulted in a judgment in favor of appellees, from which appellants prosecute this appeal, and assign numerous errors, whereby they assail certain rulings and decisions of the trial court, and the final judgment and decree thereof.

At the request of the parties the court found the facts specially and stated its conclusion of law thereon. As this finding is supported in its material points by the evidence and as the principal questions involved in this appeal are fully presented by said finding and conclusions of law thereon, we deem it only necessary to consider the alleged errors arising out of these conclusions.

The following are the material facts as found by the court:

“In 1870 one Samuel Gordon married Phoebe Ginther who had been, prior to that time, divorced from a former husband, one Peter Ginther; that appellees are the only children and heirs of said Phoebe, being the fruits of her former marriage to said Peter;

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that no children were born unto her by virtue of her marriage to Samuel Gordon; that said Samuel Gordon and said Phoebe lived together as husband and wife from the year 1870 until the death of said Samuel, which occurred at Ft. Wayne, Indiana, on the 14th day of April, 1886; that his said wife Phoebe survived him until June the 22d, 1890, at which date she died intestate, leaving surviving her appellees as her children and only heirs; that on November 23, 1878, one James B. White, who was then the owner, in fee simple, of the real estate in controversy, situated in Allen County, Indiana, for and in consideration of the sum of four hundred and fifteen dollars, together with his wife, executed a warranty deed, whereby they conveyed to said Samuel Gordon and Phoebe, his wife, said real estate; that in said deed, immediately after the description of the premises, are the following words: "To have and to hold the same to the said Samuel Gordon and Phoebe Gordon, his wife, in joint tenancy, their heirs and assigns forever." This deed was acknowledged and recorded in the recorder's office of said county. On the 15th day of October, 1885, Samuel Gordon, the husband, executed to the appellant, Herman Wilkins, a mortgage upon the said lands, to secure the payment of two hundred dollars, as evidenced by a promissory note; that his wife (Phoebe) did not join with him in the execution of said mortgage.

"On the 17th day of October, 1895, said Samuel Gordon executed a will, wherein he willed that at his death the said real estate should go to the appellant, John H. Wilkins. After the death of Samuel Gordon said will was duly probated in the circuit court of Allen County, Indiana, at which county said testator died. After the death of Samuel Gordon said John H. Wilkins took possession of said real

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estate, and that the rental value thereof is \$60 per annum. The only right or title of the appellant, John H. Wilkins, is under the devise to him in said will. The only right, title and interest that appellant, Herman Wilkins, claims in and to said real estate, is under the mortgage executed to him by said Samuel Gordon, and for taxes assessed against the said land and paid by him for the purpose of protecting his said mortgage lien. The only right or title in said real estate claimed by appellees is by inheritance thereof, as the children and heirs of their deceased mother, Phoebe Gordon." Upon this finding the court stated its conclusions of law substantially as follows:

"First, that under the said deed said Samuel Gordon and Phoebe, his wife, held the said real estate as tenants by entirety, and that at the death of her husband, Samuel, she became the sole owner thereof, and upon her death the same descended to appellees as her heirs.

"Second, that the mortgage executed by Samuel Gordon to Herman Wilkins is void, because the said Phoebe, his wife, did not join in the execution thereof.

"Third, that the defendant, John H. Wilkins, did not acquire or take any title to said real estate under the will of Samuel Gordon, for the reason that he (Gordon) had no interest in said real estate, subject to be devised by will.

"Fourth, that said defendant John H. Wilkins unlawfully holds possession of said real estate to plaintiffs' damage in the sum of \$240."

To each of these conclusions of law appellants each separately excepted. Over their exceptions and objections the court, upon this finding, rendered judgment in ejectment against John H. Wilkins and

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quieted appellees' title against both of the appellants, and decreed that the mortgage of Herman Wilkins was null and void, and that the devise of said real estate by Gordon to John H. Wilkins was of no effect.

In this State a joint tenancy can only be created as provided by section 3341, R. S. 1894, section 2922, R. S. 1881. Where lands are conveyed to husband and wife, and there are no words of limitation in the deed, or where it does not manifestly appear from the tenor thereof, that it was intended to create an estate in joint tenancy, they will take as tenants by entirety. *Hadlock v. Gray*, 104 Ind. 596, and authorities there cited. It is equally well settled by the general rule controlling in a conveyance of real estate that the husband and wife may be defeated by conditions, limitations or stipulations in the instrument of conveyance, when they clearly indicate an intention of the grantor to create in the grantees a different estate. A joint tenancy may be created to exist between husband and wife by the express terms or tenor of the deed of conveyance. *Thornburg v. Wiggins*, 135 Ind. 178, and authorities there cited. This question being settled, we are next to determine what was the character of the tenancy created by the conveyance of White to Gordon and wife. It is obvious and clear, we think, that the following expression or stipulation in said deed, namely: "To have and hold the same to the said Samuel Gordon and Phoebe Gordon, his wife, in joint tenancy, their heirs and assigns forever," brings the conveyance, in question, clearly within the provisions of section 3341, *supra*, and we are, therefore, constrained to hold that by these express terms in the instrument, a joint tenancy was vested in Gordon and wife, and that they did not take and hold the realty

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so conveyed to them as tenants by entirety. *Thornburg v. Wiggins, supra; Barden v. Overmeyer*, 134 Ind. 660; *case v. Owen*, 139 Ind. 22. We may here add that the latter words "their heirs and assigns forever" are superfluous, and in no way affect the meaning or intent of the grantor. And we may further say, that, there being no ambiguity in this deed, it follows that what the grantor, or grantees understood by its terms, or in what manner they subsequently treated it, has no bearing upon the construction thereof.

The next points arising out of the special finding and conclusions of law relative thereto, and which are presented for our consideration, are as to the power of Samuel Gordon to mortgage and devise his moiety in the lands involved in this action. This will necessitate an examination, at least, of some of the features impressed by law upon these particular estates of joint tenancy, when they are once created. Tenants of this kind are said to hold individually and jointly, having one and the same interest, accruing through one and the same conveyance, commencing at the same time and held by one and the same possession. Upon the death of one joint tenant, there being no severance in the estate, his entire interest is cast upon the survivor or survivors to the exclusion of the inheritance of the same by his heirs. The interest of the survivor in the realty is consequently increased by the extinguishment of the interest of the tenant deceased. It is settled in law that a joint tenant may alienate or convey to a stranger his part or interest in the realty, and thereby defeat the right of the survivor. *Tiedeman Real Property*, section 238; *Washburn Real Property*, Vol. 1, 682, clause 22; 4 *Kent Com.*, 460; *Preston Estates*, Vol. 1, star page 136; *Berins v. Cline's Admr.*, 21 Ind. 40; *Am. and*

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Eng. Ency. of Law, 892; 11 Ib. 1092; *Duncan v. Forrer*, 6 Binn. (Pa.) 193.

In the ancient language of the law, joint tenants were said to hold *per my et per tout*, or in plain words, "by the moiety or half and by all." The true interpretation of this phrase being that these tenants were seized of the entire realty for the purpose of tenure and survivorship, while for the purpose of immediate alienation, each had only a particular part or interest. *Preston v. Estates, supra*; 4 Kent, *supra*. Partition at common law could not be enforced by joint tenants, but under our statute partition of these estates may be enforced. Section 1186, R. S. 1881. The interest of each tenant is subject to sale upon execution. *Thornburg v. Wiggins, supra*; Freeman Executions, section 125. Having these rights and powers, at least, over his interest in the land so held, there can be no sufficient reason urged why the power of the joint tenant to mortgage the same should be denied. Any interest in real estate which a person may sell and convey, he may also mortgage. Jones Mortgages, section 136. We are, therefore, of the opinion that a joint tenant may mortgage his interest in the joint estate in like manner as though he were a tenant in common, and to the extent of the mortgage lien the right of the survivor will be destroyed or suspended, and the equity of redemption, at the death of the tenant, will be all that will fall to the surviving companion. This right of the tenant to mortgage is supported by the following authorities: *York v. Stone*, 1 Salk. 158; *Lessee of Simpson v. Ammons*, 1 Binn. (Pa.) 175 (2 Am. Dec. 425.)

It is settled by numerous authorities, that the devise under the will of Samuel Gordon, of his interest in the lands in question, to appellant John H. Wilkins, was inoperative and void, and the latter acquired no title

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thereby. The reason for this rule is apparent. Unless there is a severance during the life time of the devising tenant, at his death the right of the survivorship immediately accrues, and as the devise cannot take effect until after the death of the testator, the tenant is thereby disqualified for devising his moiety in lands so held; or in other words, as this paramount right of the survivor, or survivors, instantly prevails upon the death of the testator, there remains no estate of inheritance upon which the will can operate. *Swift v. Roberts*, 2 Burr. (K. B.) 1488; *Duncan v. Forrer*, *supra*; 4 Kent Com. 460, *supra*. A joint tenant, being disqualified to exercise this power at common law, is also disqualified by our statute of Wills, section 2726, R. S. 1894, section 2556, R. S. 1881, provides that persons may devise any interest descendible to their heirs which they may have in any lands, tenements, etc. As we have seen that the interest of a joint tenant does not descend, it follows, therefore, that under this statute he has no right or power to devise the same by will. From the conclusions which we have reached herein, it is apparent that the court erred in holding in its first conclusion that the deed created a tenancy by entirety in Gordon and wife. That it also erred in holding in its second conclusion that the mortgage executed to appellant Herman Wilkins, by Samuel Gordon, is void. The court did not err in stating its third and fourth conclusions of law. As under the special finding of facts the ultimate judgment against John H. Wilkins is right; therefore, the intervening errors complained of by him must be deemed and held to be harmless. The judgment as against Herman Wilkins is reversed and the cause remanded, with instructions to the lower court to grant him a new trial and

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leave to reform the issues if requested. The judgment as to John H. Wilkins is affirmed.

All concur.

Filed June 11, 1895.

Per Curiam. It being shown to the court that Herman Wilkins, co-appellant herein, paid the cost of the transcript in the appeal of said cause to this court, and he having secured a reversal of the judgment, so far as the same affected his interest to the real estate involved, and it further appearing that in order for said appellant to obtain the relief sought in this appeal, it was necessary for him to have certified to this court the transcript of all the proceedings of the lower court, it is therefore ordered that appellees' motion to modify the judgment and retax the cost herein be, and the same is hereby overruled, at their cost.

Filed October 16, 1895.

No. 17,759.

HOTSENPILLER v. THE STATE.

BILL OF EXCEPTIONS.—*Leave to File.—When Obtainable.—Criminal Law.—Trial.*—If leave to file a bill of exceptions, in a criminal case, is not given until after judgment is rendered, the bill, if filed within the time allowed, will not be a part of the record; for leave to file the bill can only be granted "at the time of the trial," under section 1916, R. S. 1894, the term "trial" meaning all the steps taken in the cause from its submission to the court or jury to the rendition of the judgment.

From the Adams Circuit Court.

Mann & Beatty, for appellant.

W. A. Ketcham, Attorney-General, for State.

MONKS, J.—Appellant was tried and convicted by

144	9
157	114
144	9
161	512
144	9
164	381

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the court, without the intervention of the jury, upon an indictment charging him with the crime of forgery.

The only error urged is that the court erred in overruling appellant's motion for a new trial.

The determination of the sufficiency of the causes assigned for a new trial depends upon the evidence.

The Attorney-General insists that the evidence is not in the record. It appears from the record that the court found appellant guilty of forgery as charged in the indictment, and on the 22d day of August, 1895, the court rendered judgment on said finding.

No bill of exceptions containing the evidence was filed before or at the time judgment was rendered, nor was any time then given within which to file a bill of exceptions. On August 27th, after judgment was rendered on the finding, appellant filed his motion for a new trial, which motion was overruled on September 6th, and sixty days given within which to file a bill of exceptions. A bill of exceptions was presented to and signed by the judge within the sixty days given. The contention of the Attorney-General is that after the court had rendered judgment on the finding, it had no power to grant leave to appellant to file a bill of exceptions.

Section 1847, R. S. 1881 (section 1916, R. S. 1894), provides that "All bills of exceptions, in a criminal prosecution, must be made out and presented to the judge at the time of the trial, or within such time thereafter as the judge may allow, not exceeding sixty days from the time judgment is rendered."

The word trial, as used in said section, includes all the steps taken in the cause from its submission to the court or jury to the rendition of the judgment. It is evident that the trial is terminated by the judg-

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ment on the finding of the court or verdict of the jury, and that leave to file a bill of exceptions must be obtained before or at the time when such judgment is rendered. *Hunter v. State*, 101 Ind. 406; *Bruce v. State*, 141 Ind. 464, and cases cited. As the leave to file the bill of exceptions was not given until after the judgment was rendered, it was without authority. The court can only grant such leave at the time and in the manner provided by said statute.

It follows that the bill of exceptions purporting to contain the evidence is not in the record. It is therefore presumed that the motion for a new trial was properly overruled for the reason that there is nothing in the record to the contrary.

Judgment affirmed.

Filed March 12, 1896.

No. 17,454.

**MERCHANTS AND LABORERS' BUILDING ASSOCIATION
v. SCANLAN ET AL.**

144	11
150	396
144	11
155	690

CONVEYANCE. — Husband to Wife. — Consideration. — Subjecting Wife's Inchoate Interest to Mortgage Lien.—The execution of a mortgage by a wife with her husband, by which her inchoate interest in the mortgaged land becomes subject to the lien thereof, is a sufficient consideration for a conveyance by him to her of other property.

HUSBAND AND WIFE. — Conveyance to Wife by Husband.—A deed conveying land direct from a husband to his wife, in good faith, for a valuable consideration, is valid in this State.

SAME. — Deed from Husband to Wife. — Reformation Of. — Mistake. — Description.—A deed from a husband to his wife, executed in good faith, for a valuable consideration, may be reformed so as to correct a mistake in the description of the property.

MARRIED WOMAN. — Suretyship. — Mortgage.—A mortgage by a wife

Merchants and Laborers' Building Association v. Scanlan *et al.*

of a separate property to secure a debt of her husband, is void, under section 6964, R. S. 1894, as being a contract of suretyship.

MORTGAGE.—Foreclosure. — Reformation. — A mortgage on land, the description of which is so defective and uncertain that it cannot be reformed in equity, cannot be foreclosed.

From the Jackson Circuit Court.

W. K. Marshall, for appellant.

A. N. Munden, for appellees.

MONKS, J.—This action was brought by appellant against appellees to correct an alleged mistake in a mortgage and to foreclose the same.

To the complaint the appellee, Edward Scanlan, filed a general denial. His wife, and co-appellee, Mary Scanlan, filed an answer in two paragraphs, the first a general denial. The second, that she was a married woman, the wife of her co-appellee Scanlan, when said mortgage was executed; that the real estate described in said mortgage was owned by her in fee simple and that said mortgage was executed to secure the indebtedness of her said husband and for no other consideration whatever. To this paragraph of answer appellant filed a general denial. The case was tried by the court, a finding made for appellee, Mary Scanlan, and against appellee, Edward Scanlan, for the amount of the note and interest, and over a motion by appellant for a new trial, judgment was rendered on the finding.

The only error assigned is that the court erred in overruling the motion for a new trial.

There was evidence from which it appears that on the 24th day of July, 1882, Edward Scanlan, one of the appellees, became the owner in fee simple by deed from Patrick Sheron and wife of certain real estate in Seymour, Indiana; that afterwards in 1890, he,

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Scanlan, desired to borrow \$800.00 of appellant and for that purpose subscribed for and took eight shares for \$800, payable to appellant, and he and his wife executed a mortgage to secure said indebtedness, in which the real estate was described as follows:

"The west part of lot eight (8) in block "G" in Sullivan's addition to the city of Seymour, Indiana;" that upon the execution of said note and mortgage Edward Scanlan received the amount, and out of it paid a balance of \$166.75 on a mortgage executed by appellees May 28, 1888, to the Union Building Association No. 2. of the city of Seymour, in which mortgage the real estate was described the same as in the mortgage to appellant.

C. L. Leininger was the president of both associations and examined the title, and received both mortgages. He copied the description in the mortgage in suit from the mortgage executed May 28, 1888, and knew what was written in each mortgage.

In the spring of 1890, Edward Scanlan concluded to go into business and agreed with his wife that in consideration that she would join with him in the execution of a mortgage to Phillip Meeh to secure a note for \$500 on a part of his real estate he would convey to her the property on which they resided in Seymour and that in pursuance of said agreement she executed said mortgage with her husband, and thereupon her husband on May 9, 1890, intending to convey said residence property to her executed to her a deed in which the property was by mutual mistake of the parties described by the same description as that contained in the appellant's mortgage; that Leininger, the president of appellant association, and Holtman, its treasurer, were present and heard the arrangement about the last named deed and mort-

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gage talked over by the parties and knew that the same was executed.

That afterwards, on the 16th day of September, 1893, Edward Scanlan, in order to correct the mistake in said deed to his wife and co-appellee, Mary Scanlan, executed to her another deed in which the real estate was correctly described.

It was recited in said deed that it was made in lieu of and to correct and reform the mistake in the first named deed to his wife.

There was also evidence contradicting much of the foregoing, but as we cannot weigh the evidence, the only question for this court to determine is whether there is evidence which, if uncontradicted, would sustain the finding of the trial court.

The execution of the mortgage by Mary Scanlan with her husband to Philip Meeh to secure the five hundred dollars, by which her inchoate interest in said real estate becomes subject to the lien thereof was a sufficient consideration for the conveyance by him to her of the residence property. *Hollowell v. Simonson*, 21 Ind. 398; *Citizens Bank v. Bolen*, 121 Ind. 301 (306); *Brown v. Rawlings*, 72 Ind. 505 and cases cited; *Worley v. Sipe*, 111 Ind. 238; *Jarboe v. Severin*, 85 Ind. 496.

A deed conveying real estate direct from husband to his wife in good faith for a valuable consideration is valid. *Thompson v. Mills*, 39 Ind. 528; *Enyeart v. Kepler*, 118 Ind. 34 (38); *Brookbank v. Kennard*, 41 Ind. 339.

A married woman is entitled to the reformation of a mistake in such deed the same as if it had been executed to her by one not her husband. *Comstock v. Coon*, 135 Ind. 640.

We think Mary Scanlan was entitled to have the mistake in the deed made to her by her husband

Merchants and Laborers' Building Association v. Scanlan et al.

May 9, 1890, corrected, for the reason that the deed was made in good faith and for a valuable consideration. *Comstock v. Coon, supra*; *Sparta School Tp. v. Mendel*, 138 Ind. 188; and cases cited; *Parish v. Camp- lin*, 139 Ind. 1, and cases cited.

If the mistake was one which could be corrected in equity, the equities of Mary Scanlan were superior to those of appellant for the reason that the deed to her on May 9, 1890, in which there was a mistake in the description was made in good faith and for a valuable consideration before the mortgage to appellant was executed, which was September 24, 1890. Such being the case, the deed from Edward Scanlan to his wife Mary, September 16, 1893, made in lieu of the first deed to correct the mistake in the description of the real estate intended to be conveyed, had the same effect so far as appellant's rights were concerned as if the first deed dated May 9, 1890, had contained a correct description of the real estate.

Under such circumstances, the real estate intended to be described in the mortgage to appellant was the separate property of Mary Scanlan when she executed the mortgage to secure the debt of her husband, and said mortgage, even if it correctly described the real estate, being a contract of suretyship by a married woman, was void. Section 5119, R. S. 1881, section 6964, R. S. 1894; *Allen v. Davis*, 101 Ind. 187; *Keller v. Orr*, 106 Ind. 406.

If, however, the mistake in the description in the deed and in the mortgage was one that could not be corrected in equity, then the finding in favor of appellees upon that part of the complaint which sought to foreclose the mortgage was clearly right because the description of the real estate was so defective and uncertain that the court could not render a decree foreclosing the mortgage and ordering a sale of the

Rivers v. The State.

real estate until the same was reformed. *Baker v. Pyatt*, 108 Ind. 61, and cases cited.

So that in any view of the case, there was evidence which sustained the finding of the court.

Judgment affirmed.

Filed February 18, 1896.

No. 17,614.

RIVERS v. THE STATE.

BILL OF EXCEPTIONS.—*Filing.*—*Statement in Record.*—A bill of exceptions forms no part of the record, where there is no statement in the transcript that it was ever filed in the office of the clerk of the trial court.

APPELLATE PROCEDURE.—*Continuance.*—*Bill of Exceptions.*—Alleged error in refusing a continuance will not be considered on appeal, where the bill of exceptions is not properly in the record.

CRIMINAL LAW.—*Affidavit and Information.*—*Quashing.*—*Title of Cause.*—*Name of Court.*—An irregularity in an information in failing to give the title of the cause and the name of the court, as required by section 1800, R. S. 1894, is not fatal, under section 1825, providing that no information shall be set aside for mistake in the name of the court or county in the title, or any other defect which does not tend to prejudice defendant's substantial rights upon the merits.

SAME.—*Affidavit, Sufficiency Of.*—*Crime, Where Committed.*—An affidavit in the caption of which a given county and State are named, which refers to the "county and State aforesaid," and charges that defendant did "then and there, at and in said county," commit a given crime, sufficiently charges that the crime was committed in such county.

From the Greene Circuit Court.

J. E. Lamb and *J. T. Beasley*, for appellant.

W. A. Ketcham, Attorney-General, for State.

MCCABE, J.—The appellant was prosecuted by

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affidavit and information charging him in the first count thereof with burglary and in the second grand larceny.

On motion the State was compelled to elect on which count she would prosecute, and it elected to proceed under the second. No reason has been suggested for this order, nor have we discovered any.

The appellant pleaded not guilty. A trial of the issue thus formed resulted in a verdict of guilty of grand larceny and fixing the punishment at ten years imprisonment in the State's prison, a fine of \$1,000 and disfranchisement for ten years. The court rendered judgment against defendant on the verdict over his motion for a new trial.

The error assigned calls in question the ruling refusing a new trial and the sufficiency of the facts stated in the second count of the affidavit and information to constitute a public offense.

The only ground relied on in the motion for a new trial is the overruling of appellant's motion for a continuance. But there is no showing in the transcript anywhere that appellant's bill of exceptions was ever filed in the office of the clerk of the trial court without which it is no part of the record. *Armstrong v. Dunn*, 143 Ind. 433; *Stewart v. White*, 113 Ind. 505; *Drake v. State*, (Ind.) 41 N. E. R. 799; *Smith v. State*, 143 Ind. 685.

Therefore no question is presented as to the ruling refusing a continuance.

The second count in the affidavit and information is as follows:

STATE OF INDIANA, }
GREENE COUNTY. } ss.

Oscar W. Shryer says that Charles Rivers, J. H.

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Dowell, Jack Wade, et al., late of the county aforesaid, on or about the 3d day of October, A. D. 1894, did then and there, at and in said county, unlawfully and feloniously take, steal and carry away four thousand dollars in money, and then and there of the value of four thousand dollars, and being then and there the personal goods and property of Marcus H. Shryer and Oscar W. Shryer, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana."

The first objection is that the affidavit and information do not contain the title of the cause and the name of the court as required by the criminal code. R. S. 1894, section 1800, (R. S. 1891, section 1731).

That is required by the section cited, but section 1825, R. S. 1894, (R. S. 1881, section 1756), provides that: "No indictment or information shall be deemed invalid, nor shall the same be set aside or quashed, * * * or in any manner affected, for any of the following defects:

"First. For mistake in the name of the court or county in the title thereof. * * *

"Tenth. For any other defect of imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

The defects mentioned fall within the purview of the provision last quoted and are cured thereby. It is next objected that in the body of the affidavit it is not charged that the offense was committed in Greene county. But in the caption of the affidavit that county and the State of Indiana are named. The charging part of the affidavit refers to the "county and State aforesaid" and then charges that appellant "did then and there at and in said county unlawfully, etc." That makes it clear that the crime is

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charged to have been committed in Greene county, Indiana.

It has been held by this court that when the name of the State and county are stated in the title of an indictment references afterwards made to "said county" will indicate a county in this State. *Long v. State*, 56 Ind. 133; *Anderson v. State*, 104 Ind. 467.

Besides there are many defects in criminal charges that are cured by the verdict. *Sturm v. State*, 74 Ind. 278; *Billings v. State*, 107 Ind. 54.

The objections urged to the affidavit and information cannot be sustained under the statute aside from the question that they were not taken until after verdict.

The judgment must be and is affirmed.

Filed February 18, 1896.

No. 17,280.

COATS v. GORDON ET AL.

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ESTOPPEL.—Married Woman.—Mortgage.—Tenants by Entireties.—

Notice.—A married woman is not estopped from ascertaining the invalidity, under section 6964, R. S. 1894, of a mortgage given by herself and husband on land owned by them as tenants by entirety, to secure a debt of her husband, by the mere fact that she knew such mortgage was invalid, and failed to notify the mortgagee of the character of her interest in the property. (See note at end of opinion.)

APPELLATE PROCEDURE.—Rehearing.—A rehearing will not be granted where no question is suggested which was not fully considered and decided on the original hearing.

From the Steuben Circuit Court.

Cline & Dawson and *R. W. McBride*, for appellant:

Gilbert & Roby, for appellees.

HACKNEY, J.—The appellant and her husband ex-

ecuted their joint mortgage of certain real estate to secure to the appellee Gordon a promissory note by said husband to said Gordon. The note and mortgage were assigned to the appellee Carver who by cross-complaint sought a judgment against said husband and also a foreclosure against him and the appellant. The complaint was by the appellant for a cancellation of the mortgage and the theory thereof was that said real estate, at the date of said mortgage, was owned by her and her husband as tenants by entireties; that the debt was that of her husband, and that her relation thereto was, by reason of the execution of said mortgage, that of a surety. The answer and the cross-complaint were upon the theory that the appellant had been estopped to claim the ownership of said real estate. The question for decision arises in various forms, but for the purposes of the case may be considered upon the special findings. It was specially found that at the date of the execution of the mortgage the appellant and her husband owned the real estate as tenants by entireties; that their deed had not then been placed upon record; that the husband, who was insolvent, desired to and did purchase a horse from Gordon and executed his individual note for the purchase-price; that the appellant received no interest in said horse or benefit therefrom; that the appellant at the time of the execution of said mortgage well knew that it was invalid, she knew that it was the intent and purpose of her husband to deliver the same to said Gordon and to receive said horse; that she permitted her husband to take said mortgage to the said Gordon, who resided eleven miles distant and to deliver the same to Gordon in her absence. It is further found that the appellant's husband, both before and after the execution of said mortgage represented

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to Gordon that he was the owner, in his own right, of said real estate, and that from its value and the absence of liens it was ample security for said note. There were also findings as to Gordon's reliance upon the representations of Coats and, after finding the sum due upon the note, it was stated, as conclusions of law, that the appellant was not entitled to recover, and that Gordon should recover upon his cross-complaint. The appellees seek to uphold the conclusions of the trial court upon the theory that the appellant was, by the facts found, estopped to deny the absolute ownership, by her husband, of said real estate. On behalf of the appellant it is claimed that she was but a surety for the debt of her husband, a fact apparent upon the face of the transaction; that under section 5119, R. S. 1881; section 6964, R. S. 1894, she had no power to become a surety for the debt of another and that the facts found do not constitute an estoppel against her. The facts found connect the appellant with the transaction only in the execution of the mortgage. No affirmative act or declaration of hers, beyond the execution of the mortgage, can be considered in determining the existence of an estoppel. She received no part of the consideration, the form of the transaction and the intention of her husband and of Gordon was to constitute the husband the principal debtor. The negative elements of the estoppel urged are that when the appellant executed the mortgage she knew it to be invalid and that she remained at home, permitting her husband to go to Gordon, eleven miles distant, and deliver the mortgage as security for the debt, and failed to notify Gordon that she was, as to said real estate, a tenant by entirety with her husband. Counsel suggest no doubt that the case falls within section 5119, *supra*, unless an estoppel was made out. The appellant's knowledge of the invalidity of the mortgage was but

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a knowledge of the law which, in legal contemplation, was known also by Gordon. The representations of the husband were not found to have been by the authority or with the knowledge of the appellant and do not enter into the facts tending to establish an estoppel as against the wife. In *Voreis v. Nussbaum*, 131 Ind. 267 (16 L. R. A. 45), it was held that a married woman was not estopped to assert the invalidity of her note, payable in bank and negotiated before maturity, together with the mortgage of her real estate, where, in fact, the consideration was not for her benefit, but was for the use and benefit of her husband. It was denied that any statement in the paper as to the character of her obligation, could estop her to set up, as against an innocent holder, her true relationship to the obligation. It was said that "The cases in which married women have been estopped from claiming the protection of the statute are cases where some statement, affidavit or representation has been made by the party to be estopped, which has been in good faith, relied upon by the other contracting party, so that to permit her to show the truth would be to assist in the perpetration of a fraud."

In *Vogel v. Leichner*, 102 Ind. 55, it was held that a married woman could not be estopped by the mere form of the contract and it was there said: "A person may not deal with a wife, with knowledge of the fact, and of her want of power to bind herself for the benefit of others, and relying upon the form of the contract, assert that he had no knowledge of her actual relation to the transaction. He should have inquired. After inquiry he may govern himself according to the facts or the information received from her." We are aware that recent cases have modified the rule above quoted so far as it applies to dealing directly with and apparently on

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behalf of the wife and in her separate interest. This case, however, does not fall within the modification.

In *Cupp v. Campbell*, 103 Ind. 213, it was said: "One contracting an incumbrance on the estate of a married woman cannot, however, deal with her at arm's length, knowing that she is married, and that by law she is prohibited from contracting for the benefit of another; and, knowing that she is about to incumber her separate estate in his favor, he is bound to inquire concerning the consideration, and ascertain if he may, by reasonable inquiry from her, whether it is for her benefit or for the benefit of another, and unless misled by the conduct or representations of the wife, he will be held to have acquired a knowledge of the facts which prudent inquiry would have disclosed." So it may be said, we think, that when accepting the mortgage of a married woman, to secure the debt of her husband, with knowledge that it is executed for that purpose, and that the wife has no power to incumber her lands for any such purpose, he is equally bound to make inquiry of her, or from some source that will bind her, as to her interest in the lands and thereby to acquaint himself with the facts upon which his action may be taken and upon which he may assert that diligence required of him who pleads an estoppel. Here, the appellee Gordon, without inquiry from the appellant and without an examination of the records, placed his confidence in the statements of Coats, parted with his horse and accepted an invalid mortgage. No statement and no conduct of the appellant, as we have shown, in addition to the form and character of the mortgage, were relied upon by the appellee Gordon, as concluding the appellant in the transaction with her husband.

If the failure of the appellant to seek out and notify Gordon that the property was not that of her

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husband is such a standing by as would estop her to claim the ownership thereof, the statute 5119, *supra*, which declares any such contract void, would become a dead letter. There would then be no case, where the wife knew of her ownership and failed to notify the creditor, that the statute would protect her. Such mortgages have time and again been held void. See *Allen v. Davis*, 101 Ind. 187; *Vogel v. Leichter*, *supra*; *Warey v. Forst*, 102 Ind. 205; *Brown v. Will*, 103 Ind. 71; *Cupp v. Campbell*, *supra*; *Engler v. Acker*, 106 Ind. 223; *Jones v. Ewing*, 107 Ind. 313; *Wolf v. Zimmerman*, 127 Ind. 486.

It is true that a married woman may be bound by an estoppel *in pais*, but, since the duty rests upon the person dealing with her to inquire of her or from some source which will bind her, as to her relations to the contract, and since it is his duty to show that the contract is one which she is not forbidden to make, such person is in no position to claim an estoppel when he has neglected to so inquire as to her interest and her right to make the contract, but has blindly accepted the false statements of another.

The judgment is reversed with instructions to sustain the motion of the appellant for judgment in her favor upon the special findings.

Filed November 21, 1895.

ON PETITION FOR REHEARING.

HACKNEY, C. J.—On the petition for a rehearing no question is suggested which was not fully considered and decided in the original opinion and counsel have not shaken our convictions there stated. The motion to modify the mandate is supported by the insistence that we were misled by a brief of appellant's counsel devoted to the form of the mandate, which brief had

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not been supplied to counsel for the appellee and of which they had no knowledge, or opportunity to answer. It is possibly due to counsel and to this court to say that the brief mentioned was filed after the opinion had been written and the mandate stated, and that our conclusion was reached without reference to that brief. We believed then as we do now, that the special finding stated the facts certainly as favorable to the appellees as they could be made under the issues, and since our decision did not depend upon the evidence it was immaterial whether the evidence was in the record or not. We have no reason to believe that the appellees did not avail themselves of the opportunity of the trial to make their case as strong as the facts would permit and there is no suggestion that they were overreached by the court or opposite counsel. Another trial, therefore, could not result differently.

The petition and the motion are, for the reasons given, overruled.

Filed February 18, 1896.

NOTE.—The whole subject of tenancy by entireties is reviewed in an extensive note to *Hiles v. Fisher* (N. Y.), 80 L. R. A. 805.

No. 17,257.

RARICK ET AL. v. ULMER, BY NEXT FRIEND.

WITNESS.—*Nonexpert.*—*Insanity.*—Insanity or unsoundness of mind cannot be proved by a nonexpert witness unless he first gives the facts upon which his opinion is based.

NEW TRIAL.—*Insufficiency of Evidence.*—The trial judge should set aside a verdict and grant a new trial, where a verdict is returned which is unwarranted by the evidence.

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WILL.—Testamentary Capacity.—Evidence.—Verdict.—A verdict that one was without testamentary capacity cannot rest upon the opinions of witnesses for the contestant that testator's mind was not very sound, where it appears from other parts of contestant's evidence that he had mind enough to know the extent and value of all his property, the names of those who might or ought to be the natural objects of his bounty, and was able to hold them in mind long enough to dictate and have his will prepared.

From the Kosciusko Circuit Court.

Widaman & Frazer, for appellants.

H. S. Biggs and *L. W. Royse*, for appellee.

MCCABE, J.—The appellee sued the appellants to contest the will of Andrew Rarick, deceased. The issues were tried by a jury resulting in a verdict for the plaintiff, appellee, upon which the court rendered judgment over appellant's motion for a new trial setting aside the will.

Error is assigned on the action of the trial court in overruling the motion for a new trial.

The principal ground relied on in the motion is that the evidence does not support the verdict.

The evidence shows that appellant was the widow of the testator and that she was a second wife and childless and that she and a number of his children by a former marriage and one grandchild, the appellee, a child of his deceased daughter, survived him; that appellant had lived with him some twentyfive years previous to his death; that he died seized of about four hundred acres of land in Kosciusko county, and left personal property of the value of \$2,500 to \$3,000; that by his will in question he gave his said wife, appellant, a life estate in eighty acres of land and all the personal property mostly consisting of promissory notes.

The real estate was fairly and equitably divided

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between his living children, but to his grandchild, the appellee, he gave only five dollars.

The charge in the complaint was that the will was procured by undue influence exerted by the appellant on the testator and that he was of unsound mind when the will was executed.

There are hundreds of pages of evidence in the transcript totally irrelevant to the issues, though there is now and then a stray item that is pertinent to the issues. Most of this irrelevant testimony seems to have gone in without an objection or exception. But when objection to such evidence was made it was always overruled. Irrelevant evidence is very different from incompetent evidence, especially where it has been admitted without objection.

Incompetent evidence thus admitted may be sufficient to establish a fact or facts in issue and if so there could be no reversal on the ground that the issue had been maintained by incompetent evidence. For want of an objection to its competency that objection is waived. For instance, oral evidence of the contents of the written instrument sued on in a given case may be introduced if no objection is made. No reversal could take place because that evidence may prove the contents of the instrument as thoroughly as the instrument itself. Not so if the evidence given and unobjected to, is totally irrelevant to the issue; for instance, instead of relating to the contents of the instrument sued on, if it had been to the effect that the moon is or is not made of green cheese. Such evidence, though admitted without objection, is not only irrelevant, but it does not prove the contents of the written instrument sued on and cannot support a verdict. Such is the nature of much the greater part of the vast volume of the evidence in this case.

The appellee's relevant evidence shows that Andrew Rarick, the testator, was a well to do farmer of

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more than ordinarily strong mind; that he was a good citizen, a dutiful and kind father and husband; that the appellee, a mere child at the time of the trial, was the only surviving child of his youngest daughter; that the daughter had married much against his will because he did not like the man she married; that the appellee was the first and only child of that marriage, her mother dying while she was a mere babe; that her father immediately sent her off to his father in the State of Missouri where she has ever since resided. Her father, Ulmer, remained in Indiana and two or three years thereafter married again.

The evidence further showed that some eight or ten years before his death the testator became afflicted with a cancer in his face. The ravages of the disease were steady and progressive so that in the last five or six years of his life he was a great sufferer therefrom, requiring the constant attention of his wife to keep the running ulcer in his face cleaned and dressed, which had to be done at least twice a day. During all the time and in spite of all efforts to avoid it, there was an almost unbearable odor created in the room, which she patiently endured and uncomplainingly and with her own hand tenderly ministered to his every want to the very last. This disease gave rise to the charge of unsoundness of mind and these kind offices of the appellant presumably induced the charge of undue influence, for there is not a scintilla of other evidence that has the slightest bearing on the charge of undue influence. See *Goodbar v. Lidikey*, 136 Ind. 1. (43 Am. St. R. 296).

The evidence shows that at the time the will was executed, the disease had destroyed the sight of one of his eyes and had to some extent impaired the sight of the other. In this condition, however, he had made

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several visits to Ohio and on the day the will was made went to the county seat, some seven miles from his home, his wife accompanying him on each occasion. But on the day the will was made after reaching the public square he went alone to the court house in search of Judge Haymond, since elected regular judge, whom he desired to write his will, found him, made known his business and Judge Haymond prepared the will solely on the directions and statements and requests made by the testator with no one present who had any interest in the matter.

From these facts and from his acquaintance with the testator for about thirty years he stated it as his opinion that the testator on that day was of sound mind.

The appellee's testimony as to testamentary capacity is all made up of statements of witnesses describing the disease with which the testator was afflicted, the great suffering and pain he endured therefrom and the testator's own statements that he was not fit to do business, and to this the witnesses for the appellee sometimes added their own opinion that he was not fit to do business. The only business he had to do of any consequence was lending a little money to his neighbors, taking their notes and collecting the same and the interest. His wife did this in his presence, wrote the notes, counted the money and made the calculations.

There was no evidence by any witness that he ever did an act or ever said a word that had the slightest tendency to prove unsoundness of mind. On the contrary, every act the appellee's evidence showed that he had done and every word that he had ever said tended to prove his soundness of mind, and that continued long after the will was made.

On these facts some few of appellee's witnesses who were non-experts gave it as their opinion that

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his mind was not very strong, and some that it had been weakened and perhaps that it was not entirely sound. But the facts that each of these witnesses testified to, show that his mind was sound.

None of them stated any fact which could be reasonably made the foundation of an opinion that the testator was of unsound mind. Appellee's evidence abundantly shows that the testator knew the extent and value of his property, the names of all his children and those that might or ought to be the natural objects of his bounty and that he could hold these in his mind long enough to have his will prepared.

It is settled law that insanity or unsoundness of mind cannot be proven by a witness who is not an expert, unless the witness first gives the facts upon which his opinion is based. *Grubb v. State*, 117 Ind. 277; *Burkhart v. Gladish*, 123 Ind. 337; *Fiscus v. Turner*, 125 Ind. 46; *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401.

It was said in *Burkhart v. Gladish*, *supra*, the facts stated by the witnesses mentioned were not such as "could reasonably be made the foundation of an opinion as to the mental unsoundness of the testator."

Those opinions therefore were incompetent evidence though they were not in evidence. As was said in *Hamrick v. State, ex rel.*, 134 Ind., at page 326: "In permitting an opinion by a non-expert witness as to sanity or insanity, the rule is said to grow out of the necessity arising from an inability of the witness to describe the appearance, the action, the language, and the manner of the subject with such precision and minute detail as to possess the jury of all the knowledge of the witness, and thereby enable the jury to form that opinion instead of receiving the opinion of the witness. In this State it is so well and so often decided, as to need no citation of the cases, that this opinion of the witness must proceed from

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the facts and circumstances which the witness shall have given to the jury of his acquaintance with and observation of the subject, not including, of course, those observations not susceptible of description."

Here, all the facts stated on which the witnesses based their opinions related to the disease and suffering of the testator and his unfitness to do business in that condition, none of them having any relation to his mental condition or testamentary capacity.

As was further said in the case last quoted from: "The ordinary affairs of life, and the capacity essential to transact them, are not subjects involving any rule of science or art. They are within the comprehension and common observation of that class of men who constitute the jury. They do not require a particular knowledge of the person whose capacity is under investigation. Whether that capacity exists or not is peculiarly a question for the jury. It is the very question to be passed upon by the jury. When the particular phases of unsoundness of mind, the special characteristics of the individual are given, the jury must raise the standard, and determine whether the essential capacity exists. It would hardly be contended that the abstract question of what is sufficient mental capacity to transact the ordinary affairs of life, could be made the subject of testimony. Much less can it be made the subject of opinion evidence from those whose station in life and business occupations give them no better means of knowledge than the jurors possess."

And the same may be said of the opinions of witnesses to the effect that the testator was unfit to do business or transact business.

There is no evidence to support the charge of undue influence, and neither is there any evidence to support the charge of unsoundness of mind, except the opinions of the very few witnesses who were non-

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experts already mentioned. Assuming without deciding that such opinions standing alone are sufficient to support the verdict, yet as they do not assume or pretend to furnish any measure or to define the degree of the testator's supposed mental infirmity, and as other parts of appellee's evidence show that testator had mind enough to know the extent and value of all his property, the names of all his children and those that might or ought to be the natural objects of his bounty and was able to hold all these in his mind long enough to dictate and have his will prepared, testamentary capacity is shown by appellee and therefore there is a total failure of evidence to establish testamentary incapacity. There is no conflict between those opinions of unsoundness of mind, if such opinions may be so classed, and the other parts of the appellee's evidence showing testamentary capacity. Because as was said in *Bundy v. McKnight, Err.*, 48 Ind., at page 514: "That testamentary capacity is consistent, especially in very aged persons, with a great degree of mental infirmity, and some degree of mental perversion or aberration, at times, provided there is satisfactory proof that the testator, at the time of the execution of the will, really did comprehend its import and scope, and was not under the control of any improper or undue influence, or of any deception or delusion." We do not claim the right to reweigh the evidence so as to settle conflicts therein, nor do we do so in this case because as we have seen there is no conflict.

The testator by appellee's evidence, having been shown to be of testamentary capacity, it makes no difference whether the will was just or unjust, it was his sacred right to dispose of his property as he pleased. While the children of the testator have been made defendants in this case their active aid has been on the side of the contest. A *dictum* to the

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contrary in *Bowman v. Phillips*, 47 Ind. 341, to the effect that courts will resort to technicalities to overthrow a will for the sole reason that it is unjust, is disapproved.

About all they could hope to gain by overthrowing the will would be to share in the personal property. There seems to be the best reason in the world that the testator should have given his wife something more than the law would have cast upon her. The courts should be cautious how, by taking away the power to insure respect, they thus increase the misfortunes of a class into which no one can assure himself he may not fall, which includes almost the whole of those whose lot it is to reach old age and suffer bodily affliction and which already carries a burden sufficiently heavy. If such persons cannot reward by their bounty those by whom they are treated with tenderness and by whose watchful care their comfort is guarded, they will lose, in most instances, the only means remaining to them of self-preservation.

The special judge who presided at the trial should have instantly set aside the verdict as unsupported by the evidence.

The judge of the trial court does not sit as a mere moderator to record the will of the jury. He has other functions and duties to perform which he cannot lawfully escape or evade. He must confine the evidence within the issues and when a verdict is returned unwarranted by the evidence he must set it aside and grant a new trial when asked for.

The court erred in overruling the motion for a new trial.

The judgment is reversed and the cause remanded with instructions to sustain the motion for a new trial.

Filed February 19, 1896.

The Evansville Public Hall Company v. The Bank of Commerce.

No. 17,670.

THE EVANSVILLE PUBLIC HALL COMPANY v. THE
BANK OF COMMERCE.

CORPORATION. — *Obligation Incurred by President.* — *Liability.* — *Agency.* — A corporation is liable on obligations incurred by its president, without direct authority, either by virtue of his office or by express sanction of the board of directors, where he is held out by the managers in the general course of business as having such authority. (See note at end of opinion.)

SAME. — *Note by One Corporation in Favor of Another.* — *Common Directors.* — A note made by one corporation in favor of another is not invalid merely because the two corporations have common directors, where it represents a debt justly owing from the maker to the payee.

From the Vanderburgh Superior Court.

Garvin & Cunningham, for appellant.

J. E. Williamson and Gilchrist & DeBruler, for appellee.

HOWARD, J.—The Bank of Commerce, the appellee here, sued the Evansville Public Hall Company, the appellant, to recover on a promissory note for \$3,700. In a second paragraph of complaint, subsequently filed, the bank sought to recover \$3,600 for money expended for the use of the company.

In the third paragraph of its answer, the company averred that the note described in the complaint was executed by David J. Mackey, president of the company, and that he had no authority either to incur the indebtedness or to execute the note in suit.

In a fourth paragraph of answer, it was averred that the company was organized for the purpose of buying, holding and improving real estate; that the

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amount of the capital stock was fixed at \$35,000; that at or about the time the articles of incorporation were prepared, and before they were signed, a meeting was held for the purpose of effecting such organization; that for the purpose of inducing other stockholders to subscribe to the capital stock the said Mackey proposed and agreed that if they would subscribe for the stock he would undertake the erection of the building, would put in the real estate and take stock therefor, and that the entire cost of the real estate and the improvements should not exceed the capital stock of the company; that he then and there agreed that if he did not succeed in getting other persons to subscribe for the remainder of the stock he would himself take whatever additional stock was necessary to complete the building; that at the date of said meeting, and continuously thereafter until the completion of the building, the said Mackey was largely interested in and was a director of said bank; that he was also president of said company, and occupied said positions in the bank and in the company until after the completion of the building; that shortly after said meeting, one E. P. Huston, president of the bank, became secretary and treasurer of the company; that during the whole of said time a majority of the directors of the company were directors of the bank; that in pursuance of said agreement Mackey did proceed to secure bids and have the building erected, the said Huston having full knowledge of all the facts; that on the completion of the building Mackey addressed a communication to the stockholders of the company, stating that the building was completed and paid for, whereupon the other stockholders paid their subscriptions in full; that at no time during the progress of the erection of said building did the stockholders have any knowledge of any indebtedness

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thereon; and at no time did the directors of the company authorize Mackey to incur any such indebtedness, or to execute the note sued on.

The reply to the third and fourth paragraphs of the answer alleged that the company borrowed of the bank \$4,800, which money was used by the company in the erection of said building; and being so indebted the president of the company executed the note set out in the complaint; and thereafter the company, by its board of directors, at a legally constituted meeting, ratified and confirmed the action of the president in borrowing said money. To this reply a demurrer was overruled.

The cause was submitted to the court for trial, and there was a finding and judgment in favor of the bank for the amount claimed on the note.

It is assigned as error that the court overruled the demurrer to the reply, and also overruled the motion for a new trial. The briefs are devoted almost wholly to the last assignment; and we are of opinion that the merits of the appeal may be fully and fairly determined in considering the motion for a new trial.

The reasons given in the motion for a new trial were that the decision was contrary to law and contrary to the evidence.

From the evidence it appears that the action of Mackey, as president, in giving the note of the company to the bank, was approved by the directors of the company; it also appears that the majority of the directors thus giving their approval to the president's action were also directors of the bank.

Considering this action of the directors of the company, there is no doubt, as well said by counsel for appellant, that "where the same directors act in two companies their contracts are closely scrutinized, and will not be upheld unless manifestly fair."

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This, also, is in substantial agreement with the contention of counsel for appellee. Citing 3 Thompson Corporations, Sec. 4079, and following, that "while a contract between two corporations having common directors may be voidable, it is only so when the contract is in fraud of the interests of one of the corporations, and will never be set aside by the courts where the honesty of the transaction is manifest."

If, therefore, it should appear from the evidence, as we think it does, that the sum due the bank from the company was justly owing, we think the judgment of the court should not be disturbed for the reason, if it should be so, that the president may not have had unquestionable authority to incur the debt contracted.

While a president, or other officer, of a corporation may have no authority by virtue of his office, or by express sanction of the board of directors, to incur obligations in behalf of the corporation, yet if he is held out by the managers, in the general course of business, as being the agent of the corporation, with such authority, his acts in incurring obligations will be binding upon the corporation. *Fifth Ward Savings Bank v. First Nat'l Bank* (N.J.), 7 Atl. Rep. 318; 4 Am. and Eng. Ency. of Law, 227, and authorities cited in note 3.

There is no question that Mr. Mackey was the moving spirit and chiefly interested in the affairs of the company. Of the 434 shares of stock named in the articles of incorporation as then subscribed, ten stockholders together had subscribed for 114 shares, while Mr. Mackey alone had subscribed for 320 shares. On the day of the organization it was understood and agreed by all the stockholders that he should go ahead and erect the building, a theater, and have it ready in time for the coming season.

The Evansville Public Hall Company v. The Bank of Commerce.

One of the witnesses for the appellant testifies: "Everything was in a great hurry to get the building done and the contracts out, to get ready so as not to lose the season. The meeting to organize was held on the 17th or 18th of July, and the building was completed the 7th of November."

During all this time the stockholders, except one, resided in the City of Evansville, and knew that Mr. Mackey was engaged in erecting the building.

The contractors were paid by him in checks upon the appellee bank. In this way the company's funds were sometimes overdrawn, and then deposits to its credit made the fund good again. The checks, however, were always honored; and every cent that was drawn from the bank went into the building to pay for labor and material. On the completion of the building, it was found that there had been overdrafts to the amount of \$3,700, and for this balance the note in suit was given.

It is claimed by the stockholders of appellant that on the day of the organization, it was agreed by Mr. Mackey that the building and grounds should not cost over the amount of the capital stock, \$35,000, and that it was on faith in this agreement that their stock was subscribed.

An examination of the evidence, however, fails to show any such agreement; though it does show that Mr. Mackey and all the stockholders intended that the total cost should not be outside those figures, and that all expenses should be paid out of money received on the shares of capital stock. There was nothing in the nature of a guarantee that the cost should be so limited; though it is evident that the belief and expectation of all parties concerned was that the amount of the stock should be the limit of all costs and expenses, and that all liabilities should be

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paid out of such stock. The plant when completed did cost about \$41,000. We see nothing in this to show fraud on the part of the projector, nothing to show that the cost was not kept down to the lowest figure possible, and nothing to show that the building and grounds are not fully worth the cost.

It is manifest, finally, that Mr. Mackey, the chief person interested, paid for the building and grounds by his checks, and that, as often happens, it turned out after the work was completed that the cost was greater than anticipated by the sum of \$3,700. He was in good financial standing when the work was done, but at the time of the trial had become insolvent. We are unable to see, however, that any wrong was done to any one, or that the debt of the company to the bank was not legally and honestly incurred.

The judgment is affirmed.

Filed February 10, 1896.

NOTE.—The powers of a president and vice-president of a corporation are the subject of a note to *Wait v. Nashua Armory Asso.* (N. H.), 14 L. R. A. 356.

No. 17,569.

MAJORS, EXECUTOR, ET AL. v. CRAIG ET AL.

JUDGMENT.—*Action to Correct.*—*Laches.*—A decree by default quieting plaintiff's title to land, will not be corrected nearly nine years after its rendition, and nearly four years after the actual facts are learned as against a purchaser in good faith, for value, relying upon the decree, on the ground that defendant was wrongly informed by plaintiff's attorney that the complaint did not include any lands belonging to him, where the purchaser had no knowledge that such information had been given, or that it was false and that it does not appear that defendant could not have prevented the procurement of the judgment by the exercise of reasonable diligence.

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From the Morgan Circuit Court.

M. H. Parks and *W. S. Sherley*, for appellants.

O. Matthews, *W. Hickam* and *W. R. Harrison*, for appellees.

MONKS, J.—This proceeding was brought by appellants to correct an alleged mistake in a decree rendered in 1882 by the Morgan Circuit Court. This is the second appeal of the cause. On the former appeal the judgment was reversed with instructions to the court below to sustain the demurrer to the complaint. See *Craig v. Major, Exr.*, 139 Ind. 624, where the complaint and the nature of the controversy are fully set forth.

When the cause was returned to the court below the demurrer to the complaint was sustained and appellants in this appeal, who were the plaintiffs below, filed an amended complaint, to which appellee, Satterwhite, filed a demurrer for want of facts, which was sustained.

This action of the court is assigned as error.

As this court held on the former appeal that the complaint was not sufficient, that is the law of this case, and the only question to be determined is whether the additional facts set forth in the amended complaint render it sufficient to withstand the demurrer.

The amendment consists of the following additions to the original complaint: "That said Noah J. Majors, as such executor, did not at any time sell to Satterwhite any land lying north of said original line, and said Satterwhite has not at any time paid any consideration whatever for any land lying north of said original line as established between the said Craig and Sims tracts as aforesaid; that said Sarah M. Sherley paid to said Sims the full consideration and

price for said land so bought of him, including the land lying immediately north of said original line established between said Craig and Sims tracts as aforesaid, and before she had any actual notice or knowledge of said decree and mistake therein, and after said Sims had left the State of Indiana, and ceased to be resident thereof, leaving no money or property whatever in said State, all before the said Sarah M. Sherley had any notice or knowledge that Satterwhite claimed any land off of the Sims tract, north of said original line, by virtue of said decree, which said Sims had sold her as aforesaid, and said Satterwhite had notice of the claim of right, title and possession of said land by said Sims and Sherley up to said original line, when he, Satterwhite, purchased the same from said Majors; and the said Satterwhite stood by and had actual notice that said Sarah M. Sherley was buying said land from said Sims, and paying the full price therefor, in manner aforesaid, and without asserting any right or title to any land lying north of said original line, by virtue of said decree, or otherwise, and allowed said Sims and Sherley to spend money and make valuable and permanent and lasting improvements on said land along said original line and without any objection thereto, but assenting thereto."

It was held on the former appeal that this was not a proceeding to correct the decree for any error of the court or fraud of the parties, but for the alleged reason that counsel for plaintiff, on account of a misconception by him and his client in that suit of the scope of the description of the real estate contained in the complaint, informed the defendant, Sims, that the lands claimed in the complaint were not so described as to include any belonging to him. The complaint, in this respect, is unchanged. A proper in-

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quiry or examination by Sims of the complaint on file in the clerk's office in that case would have disclosed to him the error, if any, in the alleged information as readily as to the attorney who gave it. We think that Sims, under the facts alleged, had no right to rely upon the information so given. *Lake v. Jones*, 49 Ind. 297; *Snipes v. Jones*, 59 Ind. 251; *Bowen v. Bragunier*, 88 Ind. 558 (562); *Rosa v. Prather*, 103 Ind. 191; *English v. Aldrich*, 132 Ind. 500 (501); *Ratliff v. Stretch*, 130 Ind. 282.

The amended complaint does not show that Sims could not have prevented the procurement of the judgment by the exercise of reasonable diligence. This was essential to the sufficiency of the complaint. *Hollinger v. Reeme*, 138 Ind. 363 (367-368), (24 L. R. A. 46.)

It was held on the former appeal that conceding that Sims had the right to rely upon said statement of the attorney of the plaintiff, to render the complaint sufficient to withstand a demurrer it must be alleged that Satterwhite purchased said real estate with knowledge that such information had been given by said attorneys and that the same was false. There is no such allegation in the amended complaint. It is clear that if Satterwhite purchased said real estate without knowledge of the alleged mistake in the decree, the same cannot be corrected as against him. *Craig v. Major, Exr.*, 139 Ind. 624, and authorities there cited on pp. 629, 630; *Indiana, etc., Ry. Co. v. Bird*, 116 Ind. 217 (221-226).

In the amended complaint there is an attempt to avoid the objection by alleging "that Majors did not sell, and Satterwhite did not buy, any land lying north of said original line, and that he has not paid any consideration therefor," but this can have no effect as against the allegations that he bought the real estate

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from Majors after said decree and by the description therein contained.

It appears from the amended complaint that the real estate sold and conveyed by Majors, executor, to Satterwhite was the same real estate described in the decree rendered in 1882 in the case of *Majors, Ex. v. Sims*, the same decree which it is sought to correct by this proceeding; and that said real estate was described in the same words in the proceedings to sell and the deed to Satterwhite as in the decree aforesaid. This proceeding to correct the decree aforesaid is brought with the sole reason that it and the deed to Satterwhite describe real estate which includes the strip of real estate which Mrs. Sherley claims as the grantee of Lafayette Sims.

When Satterwhite purchased the real estate at the sale, it is presumed that he paid for all described in the order of sale, notice and deed, and this presumption can only be overcome, if at all, by alleging such facts as show the contrary, and not by the statement of mere conclusions. That part of the amendment which alleges that Satterwhite had notice of the claim of right, title and possession of said land by said Sims and Sherley up to said original line when he purchased the same from said Majors, is very uncertain and indefinite.

Mrs. Sherley did not purchase the said tract until September, 1886, long after Satterwhite purchased the real estate of Majors, executor, which was June, 1883. She, therefore, had no right or claim to the Sims land or any part of it when Satterwhite made his purchase and received his deed. If Satterwhite, when he purchased from Majors, executor, knew that Sims had possession and claimed up to what is called in the amended complaint the original line run in 1858, such fact could have no force in this case for the reason

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that the decree in question settled and adjudged that Sims had no right, claim or title of any kind to any part of the lands described in the decree. *Craig v. Major, Ex., supra*, p. 629.

The other facts alleged in the amendment add no strength to the complaint and furnish no ground for correcting or setting aside the decree; besides they are all alleged to have occurred after the decree was rendered. So far as such facts may be claimed to estop Satterwhite from having the benefit of the decree as against Sherley beyond what is called the original line run in 1858, they should have been brought forward in proper form, and perhaps were in the case of *Satterwhite v. Sherley*, 127 Ind. 59. In that case the decree now in question was held to be valid and binding against Sims and his grantee, Mrs. Sherley, and as quieting the title to the strip of land in controversy not only in Majors, executor, but to the benefit of Satterwhite as a subsequent purchaser. This concludes appellant from asserting at this time anything in the amended complaint that would estop Satterwhite from claiming the benefit of the decree now in question at least as long as the same remains in force. We need not determine what effect the judgment in *Satterwhite v. Sherley, supra*, would have on the rights of the parties if the decree in question were set aside.

It is held in this class of cases: First, that the person who seeks to set aside a judgment must, among other things, aver in his complaint and prove that he could not have prevented the procurement of the judgment by the exercise of reasonable diligence.

Second, that he was reasonably diligent in discovering the fraud or mistake.

Third, that having discovered the fraud or mistake he has proceeded with reasonable diligence to obtain relief by legal proceedings. *Harman v. Moore*,

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112 Ind. 221 (227); *Ratliff v. Stretch*, *supra*, (285); *Nicholson v. Nicholson*, 113 Ind. 131 (135); *Hollinger v. Reeme*, *supra*, on pp. 368, 370; *Indiana, etc., Ry. Co. v. Bird*, *supra*; *Earle v. Earle*, 91 Ind. 27 (38-41.)

None of these essential elements are shown in the complaint. It appears from the complaint that the decree which is sought to be corrected was rendered in the spring of 1882. The real estate described in the decree was sold to Satterwhite in June, 1883. Sims sold his real estate to Mrs. Sherley in September, 1886; that Mrs. Sherley first had actual knowledge of said decree and the alleged mistake therein in 1887. This action to correct the mistake in said decree was commenced Feb. 2, 1891, nearly nine years after the decree was rendered, and nearly four years after Mrs. Sherley had actual knowledge of the facts.

There was no concealment from Sims or Mrs. Sherley of the fact that judgment was rendered, or of its effect, scope or provisions.

Sims, under whom Mrs. Sherley claims title, knew that judgment was rendered and is presumed to have known the language, scope and legal effect thereof. There is no allegation in the complaint that he did not have actual knowledge of the language of the decree from the time it was entered in 1882. There is no reasonable excuse or explanation given for this long delay in commencing this action for relief.

The other questions presented were fully considered and determined on the former appeal.

The amended complaint is clearly insufficient, and the court did not err in sustaining the demurrer thereto.

Judgment affirmed.

JORDAN, J., was absent and took no part in the decision of this cause.

Filed February 20, 1896.

Kiefer et al. v. Klinsick.

No. 17,888.

KIEFER ET AL. v. KLINSICK.

ESTOPPEL.—Husband and Wife.—Mortgage on Wife's Property by Husband.—A wife is not estopped to deny the validity of a mortgage on a stock of goods owned by her, executed by her husband without her knowledge or consent, by the fact that she permitted him to remain in possession of such goods, purchasing on credit and selling at retail, and that the mortgagee, before obtaining the security, had sold the goods to the husband on credit, believing him to be the owner of the business.

PLEADING.—Special Plea.—Estoppel.—Facts claimed to constitute an estoppel must be specially pleaded.

AGENCY.—Authority to Buy and Sell at Retail.—Right to Mortgage.—A general agent with power to buy goods on credit and retail the same has no implied authority to mortgage the entire stock of goods.

From the Cass Circuit Court.

Nelson & Myers and Morris, Newberger & Curtis,
for appellants.

Fansler & Mahoney and Winfield & Taber, for appellee.

MCCABE, J.—This case comes here from the Appellate Court under the proviso of section 1362, R. S. 1894, regulating the jurisdiction thereof, with a recommendation of a majority of that court that a certain decision hereinafter named, affecting the questions involved in this appeal, be overruled.

The facts of this case as disclosed by the evidence are briefly as follows:

In August, 1885, the appellee, Jennie Klinsick, was a married woman, the wife of one William Klinsick. She was sole owner of about \$1,300 in money which

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she had realized from property inherited by her. Her husband was a druggist by profession and was desirous of engaging in that business. A stock of drugs and fixtures, situated in a certain building in the city of Logansport, were for sale. Mrs. Klinsick gave her husband the said \$1,300, for the purpose of purchasing said stock and fixtures and with which he did purchase the same. He immediately took possession thereof and made arrangements to continue the business at the same place. He put a sign on the window in large letters in these words: "Klinsick's Drug Store." He had letter heads and prescription blanks printed and relabeled the goods in his own name. He conducted said business in his own name from the time of the purchase until shortly before this action was commenced in January, 1892. He sold from said stock, and from time to time, as the business required, he purchased goods to replenish the same. All goods bought for the purpose of replenishing said stock were bought, billed, and shipped in his name. All accounts pertaining to said business, including the bank account, were made out and kept in his own name. The stock of goods were listed for taxation in his name. His family, including the appellee, lived from the proceeds of said business during all of said time. Mrs. Klinsick was frequently around and in said store. The appellants, Augustus Kiefer and William H. Schmidt, were wholesale druggists of Indianapolis, doing business in the name of "A. Kiefer & Co." and they employed traveling salesmen in the prosecution of their business. In a short time after William Klinsick took possession of said store one of the traveling salesmen of A. Kiefer & Co. called upon him for the purpose of making sale of their goods. The salesman made inquiry of William for the purpose of

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learning the style of the firm, and said William gave the name of "William Klinsick." The said A. Kiefer & Co., relying upon such information, sold goods to the said William, and their salesmen called upon him every two weeks for the period of about six years, and sold to him in said time large quantities of goods in his own name. In the month of November, 1891, the said William was in debt to A. Kiefer & Co. on account of such sales in the sum of \$640, a part of which indebtedness was evidenced by accepted drafts and part by notes and open account. On the 12th day of November, 1891, A. Kiefer & Co. sent their attorney to see the said William Klinsick, with instructions to obtain payment or security for their claim. The said attorney saw the said William, and on failure to secure payment he offered to divide the claim into a number of notes and give long time on condition that the said William would give personal security or a mortgage on the stock. The offer was not accepted at that time. On the 29th of December, 1891, William Klinsick executed to said Kiefer & Co. a chattel mortgage on the stock of drugs and fixtures to secure such indebtedness to them, and in consideration thereof the time of payment was extended, the longest extension being for a period of eight months, and at the same time William Klinsick made an affidavit that he was the absolute owner of the stock and goods. The mortgage provided that if there were other liens, or in case of execution the whole debt should become due. In point of fact there were then executions in the hands of a constable, of which A. Kiefer & Co. had no knowledge. These executions were issued on judgments taken against Mrs. Klinsick and her husband. As soon as the constable learned of the existence of said mortgage he levied the executions on the stock of goods and took possession thereof. The appellants,

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Nelson & Myers, at the request and as the attorneys of A. Kiefer & Co., elected to treat the debt as due under the mortgage and took possession of the goods, subject to the execution levies, and afterwards A. Kiefer & Co. sold the same to third parties. The executions were paid in full before the commencement of this action. During the time William Klinsick was engaged in said business, his wife, the appellee, gave him \$600 or \$700 in addition to the original purchase price, to be used in said business, and which was used in the same. No note or other evidence of indebtedness was ever taken by Mrs. Klinsick on account of such moneys. Nor was there any settlement or statement of account between them. The appellants, A. Kiefer & Co., had no knowledge that Mrs. Klinsick had any interest in or made any claim to said store or goods until shortly before this action was instituted; and they made all sales of goods to William Klinsick upon the belief that he was the owner and upon the credit given him by reason of being the ostensible owner thereof. There was no evidence which tended to show that anything more than a retail drug business was ever done or contemplated by William Klinsick or by his wife, the appellee, prior to the execution of the mortgage. Nor was there any evidence which tended to show that there was a secret agreement or trust between Mrs. Klinsick and her husband in relation to said goods.

Nor was there any evidence which tended to show that Mrs. Klinsick had any knowledge of the execution of the mortgage by her husband at the time the same was done, or that she authorized him to execute the same. Mrs. Klinsick testified that she was the owner of the goods at the time the mortgage was given, and asserted such ownership by reason of the

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original purchase having been made with the said \$1,300, and on account of her other money used in said business. There was evidence which tended to show that Mrs. Klinsick had full knowledge of the fact that said business was conducted in the name of her husband, and there was evidence which tended to show that on one occasion, after the debt of A. Kiefer & Co. had been incurred, said occasion being on the day before the mortgage was executed, she stated to said appellants' attorney that the debt was her husband's business and that the store was her husband's store. It is proper to say that she denied that she had knowledge that the business was conducted in her husband's name and that she also denied having made the statement to said attorney that the debt and store were her husband's. The evidence upon these points was conflicting and of such a character as that the jury would have been justified in finding that she did not make such statement, and that she did not have such knowledge. We therefore cannot disturb their finding thereon.

She brought this action to recover the value of the goods alleged to have been converted. The appellants answered the general denial and two special paragraphs in estoppel. The issues joined were tried by jury, which returned a verdict for appellee in the sum of \$690, on which final judgment was rendered. The only assignment of error discussed by appellants' counsel is that of overruling the motion for a new trial. In their motion for a new trial the appellants charged that the trial court erred in excluding certain evidence offered by them, and in improperly instructing the jury and in refusing to instruct the jury as requested by them. On the trial the appellants were permitted to give in evidence the declaration of William Klinsick, concerning said business and the

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manner in which he conducted the same. On one occasion William Klinsick was at the business house of A. Kiefer & Co., in Indianapolis. He was not there for the business of buying goods, but simply made a social call. Appellants then propounded to their witness, one of the appellants then testifying, this question: "State what, if anything, he ever said to you at any time before the commencement of this suit, during the time he was running the drug store herein Logansport about the ownership of the drug store." The court sustained an objection to the question. Conceding that the declarations of William Klinsick, while in the actual possession of the goods or while in the transaction of business pertaining to said store were competent, this question is too general, as it is not limited to the time when in possession or while in the transaction of business pertaining to the store. In view of the fact that the appellants were permitted to give in evidence the declarations and conduct of William Klinsick and the manner in which he conducted said business *ad libitum* while in the actual possession, there was no error in this ruling. The ownership of the goods, at the time the mortgage was executed, was one of the important questions in the case. It was a question of fact to be determined by the jury under proper instructions by the court. One of the methods of acquiring the title to personal property is by gift. The appellants contend that the court erred in refusing to give certain instructions as requested by them, and in modifying other instructions relating to the subject of a gift of the money and of property. After a careful examination of all the instructions given by the court bearing upon a gift of property and money, we are satisfied that this matter was fairly presented to the jury, and it is unnecessary

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to set out in this opinion the instructions given, refused, and modified, relating to a gift.

The court also, of its own motion, gave several instructions to the jury bearing upon other questions to which the appellants excepted. The appellants presented to and requested the court to instruct the jury on the subjects of agency and *estoppel in pais*. The court refused these requests. These instructions are very lengthy, and we will not encumber this opinion by setting them out. If, upon the above facts, the law is with the appellee then the ultimate judgment is right and no intervening error, if any there be, will avail the appellants in securing a reversal. In this branch of the case the appellants contend, first, that the facts disclose that William Klinsick was the agent of the appellee, with full authority to mortgage the stock in his own name for her; second, that the facts establish an *equitable estoppel* against her. The usual method of transacting business by an agent is to use the name of the principal, but if the agent transact the business in his own name, but actually for an undisclosed principal, the person with whom the contract is made may, when he discovers the principal, elect to hold the principal for the contract, although he may have dealt with the agent, believing him to have been the principal and given him credit. *Thomson v. Davenport*, 9 B. & C. 78; *Mechem Agency*, section 697; *Story Agency*, sections 446, 449; *Thomas v. Atkinson*, 38 Ind. 248. Conceding, without deciding, that the facts of this case show that William Klinsick was the general agent of Mrs. Klinsick in the management of the business, and had power to buy goods upon credit, and to retail them and to apply the proceeds to the payment of the debts contracted, it does not follow that he had authority to execute the mortgage. An agent authorized to sell either real or personal

property has no power to mortgage. *Jeffrey v. Hursh*, 49 Mich. 31; *Wood v. Goodridge*, 6 Cush. 117; *Mechem Agency*, sections 323, 361. In *Switzer v. Wilvers*, 24 Kan. 384, 36 Am. Rep. 259, the plaintiff left a colt with the defendant with authority to sell the animal. The defendant, without authority, executed a chattel mortgage in his own name to another party. It was held that the mortgage was void and that a power to sell does not authorize a mortgage. If the owner of the personal property place another in possession with full power to sell for cash or on credit, at wholesale or at retail, a sale made by such person will confer a valid title, whether the sale be made in the agent's name or in the name of the principal. Or if the owner of personal property sell it upon credit and deliver the same to his vendee for the apparent or implied purpose of resale by such vendee, a condition in the contract that the title shall remain in the vendor until the purchase price is paid is void as against a purchaser from his vendee. *Winchester Wagon Works, etc., Co. v. Carman*, 109 Ind. 31. But if the sale be not for the purpose of consumption or resale, and be upon the condition that the title of such property shall remain in the vendor until the purchase price is paid, the vendee cannot, prior to the payment of the purchase price, sell or encumber the property in such a manner as to defeat the title of the original vendor. *Bradshaw v. Warner*, 54 Ind. 58; *Baals v. Stewart*, 109 Ind. 371; *Dunbar v. Rawles*, 28 Ind. 225; *Hodson v. Warner*, 60 Ind. 214; *Lanman v. McGregor*, 94 Ind. 301; *Payne v. June*, 92 Ind. 252; *Thomas v. Winters*, 12 Ind. 322. A chattel mortgage is a conditional sale, and upon the breach of the condition the sale becomes absolute. If appellants' mortgage be upheld, it results in a sale at wholesale. The facts of this case, however, show that only a retail business was contemplated by the ap-

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pellee. A power to sell at retail does not authorize a sale at wholesale. The last contention that the appellee is estopped by her acts, declarations and conduct to assert a claim to the goods adverse to that of the appellants is the most important question in the case. The estoppel sought to be invoked against the appellee assumes or proceeds upon the theory that she was the original owner of the goods, but that owing to her conduct she has lost her title thereto. The vital principle of an equitable *estoppel* is that of fraud. He, who by his language or conduct, leads another to do what he would not otherwise have done, will not be permitted to subject such person to loss or injury by disappointing the expectations upon which he acted. A change of position by the first party would involve both fraud and falsehood, and the law abhors both. The principles of *estoppel in pais* have been applied to a great variety of cases. The doctrine has no application where everything is equally known to both parties, or where the party sought to be estopped was ignorant of the facts out of which his rights sprung or where the other party was not influenced by the acts asserted in estoppel. But if one stand by and see another purchase property without disclosing his interest to the person about to purchase, he cannot afterward set up a claim of which the purchaser had no notice. Nor is it necessary that the person sought to be estopped be present at the time the sale is consummated. If he have knowledge of the contemplated sale and of the fact that the purchaser is ignorant of his rights it is his duty to disclose his interest to such purchaser. Nor is it necessary that there should exist a design to deceive or defraud on the part of the person sought to be estopped. It is enough if when he asserts his claim it would be inequitable and unjust to allow it to

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prevail against the purchaser. The falsehood and moral wrong which the law denominates fraud appears when the claim is asserted. And this is true whether a party knowingly remains silent or so negligently conducts himself with reference to his rights as to mislead another. *Duckwall v. Kisner*, 136 Ind. 99; *Anderson v. Hubble*, 93 Ind. 570; *Fletcher v. Holmes*, 25 Ind. 458; *Gatling v. Rodman*, 6 Ind. 289. The appellants claim title to the property through the mortgage. The facts of this case, however, show that the appellee had no knowledge of the execution of the mortgage and that she never authorized it. If she had no knowledge of the execution of the mortgage, that could not of itself work an estoppel against her. It is true that title may be created by an *estoppel in pais*. *Pitcher v. Dove*, 99 Ind. 175. But the person who invokes this principle must invoke it for himself, and not in the interest of a third party. The appellants contend that the appellee estopped herself by her conduct in permitting her husband to take and remain in possession of said goods for more than six years; buying and selling and conducting said business in his own name; that the fact that he was in possession conducting said business in his own name and exercising the powers of ostensible ownership, induced the appellants, A. Kiefer & Co., to believe that he was the owner thereof and that they gave him credit and sold goods to him upon the faith and credit of being the owner thereof. It will be observed that this contention is not based upon the conduct of the appellee at the time of the execution of the mortgage, but upon her declarations and conduct prior to that time. The rights of A. Kiefer & Co. in the property in controversy, if any they had, prior to the execution of the mortgage were only such rights as they acquired by reason of being creditors

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of the appellee or of William Klinsick. The right that a general creditor has in the property of his debtor is extremely vague and uncertain; but as the right may ripen into something tangible, and as it is the duty of a debtor to apply his property in discharge of his debts, the law will protect the creditor against the fraudulent operations of the debtor and will aid the creditor in subjecting the debtor's property to the payment of his debts. If one person permit another to use his property, exercising all the powers of ownership over it for the purpose of giving such other person credit and financial standing, and such other person contract obligations upon the faith created by reason of such ostensible ownership, the real owner will be estopped to deny the right of such creditors to subject such property to the payment of their claim. Again, if one knowingly or negligently permit another to use his property, exercising all of the powers of disposition over it, and knows, or might have known, by reasonable diligence, that third parties were dealing with such person, creating obligations upon the faith and credit given such person by reason of such ostensible ownership, the real owner will be estopped to deny the right of such creditors to subject the property to the payment of their claims. If A allows lands paid for by him to be taken in the name of B, and third persons deal with and give B credit, without knowledge of the rights of A, A will be estopped to assert an interest in the lands as against such creditors. *Minnich v. Shaffer*, 135 Ind. 634; *Michener v. Bengel*, 135 Ind. 188; *Adams v. Curtis*, 137 Ind. 175. A deed of conveyance is the highest evidence of title to real estate, and when coupled with possession, the grantee has all the *indicia* of title. The statute, section 3335, R. S. 1894, requires all conveyances of land to be by deed in writing, subscribed,

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sealed and duly acknowledged. When the debtor exhibits his deed, or the creditor learns of it through the record, the creditor has the right to rely upon it for all it purports to be. The same rule holds good in reference to the transfer of certain kinds of personal property, such as shares of stock in corporations, promissory notes and the like, such transfer being regulated by statute. In *Hirsch v. Norton, Admr.*, 115 Ind. 341, it appeared that Hirsch assigned and transferred ten shares of bank stock to one Study, and caused the formal transfer to be made upon the books of the corporation; the bank issued a certificate for the ten shares to Study. At the time of the transfer Hirsch and Study entered into a secret agreement to the effect that Hirsch should remain the owner of the stock. The court held that the creditors of Study, whose claims were contracted upon the faith of such ownership, would be protected against such secret agreement. That decision rests upon the fact that the shares of stock were a peculiar kind of personal property and assignable by a peculiar method, prescribed by statute. The court said: "The cases which govern transfers of tangible personal property cannot control where the subject of the transfer is the capital stock of a corporation." In that case Study was clothed with all the legal *indicia* of title. "In appearance he was the sole and legal owner of the stock. The books of the bank showed this ownership and he was the holder of the certificate which was the highest and best evidence of ownership. Nothing was lacking in his evidence of title." In *Moore v. Moore*, 112 Ind. 149, it was held that where the holder of a promissory note is induced by fraud and without consideration to indorse and deliver to another, who afterwards indorsed it to an innocent purchaser, the original holder was estopped to deny the title of the

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fraudulent endorsee as against the last purchaser. That decision rests primarily upon the fact that the statute, section 7515, R. S. 1894, provides that all promissory notes "shall be negotiable by indorsement thereon so as to vest the property thereof in each indorsee successively." The first indorser clothed his indorsee with every *indicia* of title and put it in his power to transfer the note with all the evidence of ownership being in him. To permit the first indorser to question the title in the hands of the last holder would be a palpable fraud, such as the law will not tolerate. 2 Herman Estop, section 978. The case before us is distinguishable from the above cases cited and relied upon by the appellants. In these the effort was to obtain the judgment of the court affecting the status of particular property. And in those cases also the debtor or the vendor was clothed with all evidences of title. Here William Klinsick had possession of the goods, which was only *prima facie* evidence of title in him. Such personal property as is here in controversy is usually transferred by mere delivery unaccompanied by any other evidence of title. In the complexity of modern commercial transactions, it is no unusual thing for the person who has the possession of goods and chattels and empowered to sell the same to be but a mere agent or servant. Possession of such property unaccompanied by any other evidence raises but a bare presumption of title. The largest commercial transactions are frequently consummated through the medium of agents, factors or brokers, and in which the real owner's name does not appear. The law will not permit a debtor to transfer and secrete his property fraudulently from his creditors, but will uncover it and subject it to the payment of his debts. But this is not an action to set aside a fraudulent conveyance, or to subject particu-

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lar property to the payment of debts. Either the appellee or her husband was the owner of the stock of goods before the mortgage was executed. If the husband was the owner, that is an end to the controversy. The jury found that he was not. If the appellee was the owner and her husband was in possession as her agent, with power to conduct the business and contract debts, but without power to mortgage or sell at wholesale, then the rights of the appellants were only such as a general creditor has in the property of his debtor. If there was any claim here that the goods mortgaged were the same goods sold by A. Kiefer & Co., a very different question would be presented. One of the answers in estoppel states incidentally that the mortgage on the goods was executed to secure an indebtedness for goods previously sold by them to William Klinsick, "a part of which are the identical goods sued for." What part or how much is not stated. The answer purports to be a full and not a partial defense. Indeed, it proceeds upon another and different theory than that a part of the goods mortgaged were the same goods sold by A. Kiefer & Co. to William Klinsick. And the case was tried upon such other theory of defense. The mere fact that a creditor may have an equitable interest in the property of his debtor does not give the creditor the right to convert it to his own use. The debtor has rights also, and other creditors may have rights. The appellants also assert that there is an element of estoppel in the declaration of the appellee when she stated to their attorney that the debt and store belonged to her husband. They claim that they were induced to extend the time of payment and to take a mortgage on the faith of this declaration. But supposing the jury were not justified in finding against

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the appellants on that point, yet the undisputed evidence further shows that appellants' claim had already been contracted when this statement was made, and it also appears that their attorney, when he called upon William Klinsick in November, offered to extend the time of payment and give the said William all the time he wished on condition that he execute a mortgage upon the stock. All of this occurred long before such declaration was made by the appellee.

This being true, it does not occur to us that they were misled into doing the very thing they were proposing to do, before the declaration was made. Nor does it appear that the appellants took the mortgage relying upon such declaration. Moreover, the evidence of these declarations of the appellee, Mrs. Klinsick, if it stood wholly uncontradicted, was entirely without force, because it did not tend to establish any fact in issue in the case. It has been argued by the learned counsel as evidence establishing an *estoppel in pais* against Mrs. Klinsick's assertion of title to the goods in question.

That is certainly the nature of that evidence and it may be truly said that it has no other tendency or relevancy to the case.

But there was no answer setting up any such estoppel.

It has been repeatedly held by this court that if facts constituting an estoppel exist, they must be pleaded specially. *Fleener v. Claman*, 112 Ind. 288; *Robbins v. Magee*, 76 Ind. 381; *City of Delphi v. Startzman*, 104 Ind. 343; *Sims v. City of Frankfort*, 79 Ind. 446.

The case of *McGirr v. Sell*, 60 Ind. 249, is a much stronger case against the right to invoke the aid of an equitable estoppel than is made by our conclusion

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in the case now before us. And that is the case that the majority of the Appellate Court have recommended us to overrule. It is tacitly conceded all round that we need not go to the full extent of that case to affirm the judgment in the case at bar. The acknowledged ability and learning of the judges of the Appellate Court have induced us to give to their recommendation that earnest and thoughtful consideration which seemed to be demanded under the circumstances. We have availed ourselves of the research and learning employed, not only in the briefs of the counsel, but that in the opinions of both the majority and minority of the Appellate Court and all other aids at our command in the limited time at our disposal, to enable us to properly determine whether *McGirr v. Sell* ought to be overruled. And after such investigation we have reached the conclusion that it ought not to be overruled. The first impression made on the mind in reading the case is that it is wrongly decided. But it cannot be said that the case was not thoroughly considered. And in the last opinion, it seems to have been twice thoroughly and extensively considered. On a petition for a rehearing a second opinion was delivered by Worden, J., the first opinion having been delivered by Howk, J. Both opinions bear evidence that they were carefully and thoroughly considered. And in the last opinion, Worden, J., speaking for the court, goes into the subject extensively, citing numerous authorities in support of the conclusion reached, not cited in the original opinion, and making a much more lengthy opinion than the original. Yet, great as the fame of that eminent jurist for ability and learning is, we should feel constrained to overrule the case if clearly convinced that it did not correctly declare the law. But we are not so convinced. To overrule that case

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would involve the necessity of overruling a large number of other cases decided both before and since *McGirr v. Sell* in this court, which cases have never been questioned. We will refer to them further on. The class of cases cited in the majority opinion of the Appellate Court supposed to be in conflict and inconsistent with *McGirr v. Sell* is well represented by the main case relied on in their opinion, namely, *Preston v. Witherspoon*, 109 Ind. 457. But it seems to us not to have the force and effect ascribed to it by the majority of the Appellate Court. There, Runcie and Wallace were engaged in shipping wheat and receiving wheat for storage for hire from farmers, and on demand of the depositors they agreed to return to them wheat of a like kind, quality and amount as that deposited, but not the identical wheat. There was a direct authority given by the depositors to Runcie and Wallace to sell their wheat in the very manner in which it was sold, and, of course, the depositors could not assert title after it had passed into the hands of innocent purchasers, who purchased on the faith of such authority, because the principle of *estoppel in pais* directly applied. The act of the depositors in authorizing Runcie and Wallace to sell the wheat exactly as they did sell it, was such an act on their part as would make their subsequent assertion of title against the *bona fide* purchaser for value relying upon such authority a fraud on such purchaser. That constitutes the very essence of *estoppel in pais*. The principles of that case and the class of cases to which it belongs, have no application to the facts in the case at bar, or to the facts in *McGirr v. Sell*. In the case at bar the right to sell at retail is conceded, but the sale was not at retail. There is not a shadow of evidence that William Klinsick had any authority to mortgage the property or sell at wholesale as the agent

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for the appellee. Nor do we consider the cases to set aside fraudulent conveyances and to subject property to sale on execution in point. In such cases the effort is to reach specific property for a specific purpose. The jury found that William Klinsick was not the owner of the property. This being true, the appellee, Mrs. Klinsick, still remained the owner at the time the mortgage was executed. The title could only pass from her to the appellants by some act of hers or of her agent authorized to pass such title, or by some act of hers by which she would be estopped to deny such authority and transfer. There is no pretense that she made a sale or mortgage in person. Her husband had been authorized by her to sell, and he sold only at retail. On no other occasion did he mortgage or sell at wholesale. Appellants could not therefore have been misled as to his power. We repeat, a power to retail does not confer power to mortgage or sell at wholesale. As William Klinsick did not own the goods, and as he had no authority to mortgage or sell at wholesale, the rights of the appellants were only such as a general creditor has in the property of his debtor. One general creditor has no right to convert the property of his creditor to his own use, and then defend on the ground of the indebtedness. That is what this case is in a nut shell. The creditor has no absolute right to the property of his debtor even when levied on by an execution. The debtor if a resident householder, is entitled to claim \$600 worth of property as exempt from execution. The indebtedness will not justify or excuse the tort in converting the property. It may be conceded that the appellants sold goods to William Klinsick upon the faith and belief that he was the owner of the stock of drugs; this act would give them no specific interest in the property. Nor would they have any specific

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interest in it if William Klinsick were the actual owner in the absence of a mortgage by him. He might have legitimately applied it to other purposes. The same is true of Mrs. Klinsick if she were the owner. The mere fact that appellants may have been misled in giving credit cannot operate to confer title to the property of the supposed owner on them. Creating a debt and transferring title to property are two distinct and separate things. When the appellants gave the credit and their claims came into existence, that was a completed transaction wholly independent of the mortgage, it not then being even in contemplation; and yet the estoppel sought to be invoked ties together the giving of the credit with the execution of the mortgage and makes them parts of the same transaction, ignoring all the rights of the debtor in the disposition which he might lawfully make of the property in the interval between the two acts. When the two acts are separated, as they must be, the weakness of appellants' position is apparent. The cases before referred to as standing on the same basis as *McGirr v. Sell* and the overthrow of all of which would be involved in overruling that case are *Bradshaw v. Warner*, 54 Ind. *supra*; *Baals v. Stewart*, 109 Ind. *supra*; *Hodson v. Warner*, 60 Ind. *supra*; *Dunbar v. Rawles*, 28 Ind. *supra*; *Lauman v. McGregor*, 94 Ind. *supra*; *Payne v. June*, 92 Ind. *supra*; *Thomas v. Winters*, 12 Ind., *supra*. These are all cases involving the right of the vendor of personal property which is sold and delivered upon condition that the title is not to pass until paid for to reclaim the same from a *bona fide* purchaser from the conditional vendee on the ground that the property had not been paid for. In all these cases it was shown that the purchaser from the conditional vendee finding him in possession, exercising all the acts of ownership, and

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having no knowledge of the nature of the contract between him and his vendor, and relying upon the apparent absolute title of such conditional vendee, purchased such property in good faith for a valuable consideration. And in several of the cases the doctrine of *equitable estoppel* was expressly invoked to protect such innocent *bona fide* purchaser. But in every case the right of the original vendor to recover and reclaim the property from such *bona fide* purchaser was upheld by this court refusing to apply the doctrine of *equitable estoppel* for the protection of such *bona fide* purchaser. Some of these cases expressly refer to *McGirr v. Sell* as authority. And a large number of this class of cases, both in and out of this State, are cited as authority for the conclusion reached in the opinion overruling the petition for rehearing in *McGirr v. Sell*, among which are *Dunbar v. Rawles, supra*, *Bradshaw v. Warner, supra*, and *Thomas v. Winters, supra*. There is good reason why the doctrine of *estoppel in pais* in such cases does not apply. The law authorizes a conditional sale of personal property, and though the property is delivered to the conditional vendee, the title may be retained by the conditional vendor until the purchase-price is paid. The very fact that such a condition is exacted by the conditional vendor is evidence that he does not regard the personal obligation of such vendee sufficient to make him secure. This knowledge of the value of the personal obligation of the conditional vendee evidently is the result of careful inquiry for the protection of such vendor. When he makes such a contract, he has done nothing more than the law authorizes and empowers him to do for his own protection. There is no wrong about it, there is nothing immoral about it. And if all others in dealing with

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the conditional vendee as to that property will take the same care and precaution that he did, no one will lose anything. If there was a fixed legal mode of conveying ordinary personal property as there is for conveying real estate, bank stock and some other peculiar kinds of personal property, a different rule might obtain. In those cases the conveyances are to be in writing and made a matter of public record. Hence, when the owner of real estate suffers it to stand in the name of another on the public records, on the faith of which credit has been extended to such person, or the property purchased in good faith in ignorance of the true state of the title, the real owner may be estopped to assert his title against such creditors or purchaser, the other elements of estoppel existing. *Quick v. Milligan*, 108 Ind. 419. The latter is one of the cases cited and relied on in the opinion of the majority of the Appellate Court, and well represents another class of cases cited in such opinion. That line of cases is not applicable here for obvious reasons.

But in case of ordinary personal property it is different. The title to such property may be, and ordinarily is, transferred from seller to buyer by a mere verbal agreement. And the seller may secure himself by retaining the title until it is paid for, although he delivers the possession to the vendee. If there was any legal mode of making this contract a matter of public record or notoriety, he might be estopped from asserting his title against a *bona fide* purchaser, on his failure to so make it public. But there is not. He cannot mark or brand the property so as to convey correct information to the world, because such marks may be effaced.

If he may not sell his property, retaining the title for his security lest some one too full of trust and confidence shall purchase it *bona fide* and in ignorance of

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the true state of the title, without subjecting himself to be estopped to assert his title, then his property must remain in unproductive idleness; and that, too, not because he is about to do any act to mislead anybody, but because somebody may have too much confidence in the very man that the owner of the property does not confide in.

Every man who purchases personal property of another ordinarily takes chances of losing the purchase-price, if he has failed to inform himself in advance as to the title of the seller, if such seller is not financially good.

In *Mansur v. Haughey*, 60 Ind. 364, a case very much in point here, at page 370, it was said, by this court, that: "The doctrine of *estoppel in pais* involves that of contributory negligence." And that case cites with approval *McGirr v. Sell*. He who purchases ordinary personal property of another, whose financial standing is not good, without informing himself as to the state of the title, certainly acts imprudently to say the least of it. It was within his power to obtain correct information. It was not in the power of the conditional vendor ordinarily to inform the world that he had retained the title until the purchase-money was paid. Had he known of the contemplated sale by his conditional vendee before it was consummated, the imperative duty to forbid it arose; and on failure of which he will be estopped. But where he knows nothing of it, he cannot be made chargeable with the consequences of the over-confident purchaser's imprudence and negligence in trusting to the man whom the original vendee would not and did not trust. In such a case the conditional vendor has done no act or said no word to mislead the *bona fide* purchaser to confide in the conditional vendee's title, nor has he remained silent when he ought to have spoken with like effect.

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To carry the doctrine of *estoppel in pais* to the full extent insisted on by the appellants would result in making it wholly unsafe for one to lend his horse to a neighbor for the most laudable purpose lest the borrower may sell him to one ignorant of the true state of the title. In such case, according to appellants' counsel, the doctrine of *estoppel in pais* may be invoked to confer title on the careless man who bought the borrowed horse without informing himself as to the title.

The same principles apply where the owner puts his property into the possession of his agent to carry on a certain business for such principal. One who deals with such agent in regard to such property, outside of the line of business he is authorized to and is carrying on for his principal, without informing himself as to the title of such agent, cannot invoke the principle of *estoppel in pais* against the principal's assertion of title, unless such principal has done or said more than simply to put such agent in charge of such property and business, clothing him with power to carry it on calculated to mislead the person so dealing with such agent. In the language of Mitchell, J., speaking for the court in *Alexander v. Swackhamer*, 105 Ind. 81: "To constitute an estoppel the party sought to be estopped must have designedly done some act or made some admission inconsistent with the claim or defense which he proposes to set up, and another must have acted on such admission."

If this is not law, then a man is bound to refrain from employing agents to carry on any business for him in connection with any property unless he does so at his peril. The principal cannot give notice to all the world that he is the owner of the property and that his employe is but his agent to sell at retail. When the world finds the agent selling at retail con-

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stantly and habitually, it makes no difference to the customers of such business whether the one in charge is the owner or agent for the real owner. Because if he is the owner, the purchasers at retail are safe, but if he is not owner, but merely an agent, such retail purchasers are equally safe, because the owner in suffering him to habitually and constantly sell at retail has held him out to the public as clothed with authority to make such sales at retail. The doctrine of *estoppel in pais* directly applies to such sales to prevent the owner from disputing their validity.

But where the whole business is sold out, as was practically done in this case, by the agent without the knowledge, consent or authority of the principal, there are no facts on which an *estoppel in pais* can rest.

In *Dean v. Doe*, 8 Ind. 475, at page 479, it is said: "Estoppels are said to be odious. But the truth is, says Smith, that the courts have, for some time, been favorable to the doctrine of estoppel—hostile to its technicality. 2 Lead. Cas. 460. It is only when used to entrap by formal statements and admissions, looked upon as unimportant when made, and by which no one was ever deceived or induced to alter his position, that estoppels are still, as formerly, odious."

In *Lash v. Rendell*, 72 Ind. 475, Rendell purchased certain land on which there was a judgment lien which he agreed to pay as a part of the purchase-price. When he came to pay the judgment, he found several receipts of payments endorsed on the record where the judgment was entered, and supposing them correct, paid the balance of the judgment to the clerk of the court, and paid all the balance of the purchase-money to the administrator of the estate of the deceased vendor. The receipts proved to be incorrect, being for too much. When sued by the owner of the judgment for the balance he set up these facts,

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and his *bona fide* reliance on the receipts in estoppel of the owner of the judgment and that the estate of the deceased vendor had been finally settled. It was there said "that the law does not provide for the receipting of judgments upon the record, or the effect of such receipts, and that they are subject to be explained or contradicted as against purchasers without notice. It would seem, therefore, that such receipts as these set up in the first paragraph of answer * * * * could hardly be regarded a good plea of estoppel. Every estoppel, because it concludeth a man to allege the truth must be certain to every intent, and not to be taken by argument or inference. Co. Lit. 352 b." To the same effect is *Brickley v. Edwards*, 131 Ind. 3.

The case just quoted from has an important bearing here because the law does not provide for the mode of transferring ordinary personal property any more than receipting on the record for the payment of a judgment, as the law was at that time. And also the case involves the element of contributory negligence on the part of the one relying on the receipts. He was bound to know that they could be contradicted or explained. Hence the duty devolved on him to inform himself as to what the true amount of the judgment was which remained unpaid. If there had been, as the court intimates, an honest mistake made by duplicating a receipt for one payment, which was unintentional on the part of the judgment plaintiff, that was not good ground for an estoppel.

The case last quoted from strongly supports *McGirr v. Sell*, and would have to be overruled if the latter case should be.

The facts in the *Peters Box and Lumber Co. v. Lesh*, 119 Ind. 98, are that the appellant, carrying on a saw mill business in Fort Wayne, had previously em-

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ployed one, Milliard, to purchase logs for such appellant, which fact was known to appellees. Lesh *et al.* lived and did business in Kosciusko county, Indiana. With this knowledge on the part of said appellees, said Milliard, representing himself to them as the agent of said lumber company, purchased of said appellees a lot of saw logs for said lumber company, which were to be shipped to said lumber company at Fort Wayne, Indiana, and on receipt thereof said company was to send a draft on New York for the purchase-price. Said Milliard requested that the bill of lading be made out in his name, which was accordingly done by the consent of the sellers. It turned out that Milliard was not acting as the agent of the lumber company at that time, and that he immediately sold the logs to the lumber company, who in good faith, believing they were the property of Milliard, from the bill of lading, paid him therefor their value in cash and he decamped with the money.

On this state of facts the appellant lumber company defended the suit to recover the value of the logs by said appellees on the ground that they were equitably estopped from asserting title to the logs by the circumstances of their permitting the bill of lading to be made out in Milliard's name, and the subsequent purchase by the appellant in good faith, relying on said bill of lading showing title in said Milliard. But the trial court denied such defense, and this court affirmed the judgment.

After quoting from *Alexander v. Swackhamer, supra*, a part of which is already quoted in this opinion, Coffey, J., speaking for the court, said: "If the appellees acted under the belief that Milliard was the agent of the appellant, and that they were selling the property to the appellant, basing such belief on the representations made to them by Milliard, we do not

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think that they would be estopped from claiming their property by reason of permitting the bills of lading to be made out in the name of the supposed agent." To the same effect is *Hays v. Reger*, 102 Ind. 524. These two cases support *McGirr v. Sell*, and would have to be overthrown if it is overruled.

They were correctly decided, because in the former case the appellant, Lesh, the owner of the judgment, did not know the facts out of which her rights sprung when she did the acts which were set up to estop her. She did not know that duplicate receipts of one payment had been placed on file. And in the other case, *Lesh et al.* did not know the facts out of which their rights sprung when they did the act set up to estop them, namely, allowing the bill of lading to be made out in the name of Milliard, they supposing from his false representations that they were selling the logs to the lumber company through him as the agent of such company. So that in both cases there was an essential element of an *estoppel in pais* lacking. In *Robbins v. Magee*, 76 Ind. 381, *supra*, at page 388, Elliott, J., speaking for the court, said: "The doctrine that a person who does an act in excusable ignorance of a material fact is not thereby estopped, is founded in sound reason and is well sustained by authority."

In the *Greensburgh, etc., Turnp. Co. v. Sidener*, 40 Ind. 424, it was said: "To constitute a valid estoppel by conduct, there must be knowledge on the part of the party sought to be estopped, and want of knowledge on the part of the party relying upon the estoppel."

To the same effect are *Allen v. Frazee*, 85 Ind. 283; *Hays v. Reger*, *supra*; *Hosford v. Johnson*, 74 Ind. 479.

And the same principle underlies and supports *McGirr v. Sell*. The answer upon which the question there arose not only failed to show that Sell, by act, conduct or declaration, induced McGirr to levy upon,

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take and convert the property in controversy, but it also failed to aver that Sell had any knowledge or notice, or that he had the means of knowledge or notice of any of the acts of McGirr in levying upon or selling the property. Nor was it averred anywhere in said answer that the fact that McCoy was authorized to and carried on said business in his own name, was held out as the ostensible owner and contracted the debts as such owner on which the judgments and executions were founded by virtue of which McGirr seized the property, were even known to McGirr, much less that such facts led or induced him to make such seizure and levy. Moreover, there is nothing in the answer in *McGirr v. Sell*, conceding that the Constable McGirr succeeded to the rights of the creditors, to show that such creditors would be injured by permitting Sell to assert title to the property. His assertion of title was founded on the fact that he was principal and that McCoy was his agent, and that therefore he was the real debtor. If he was solvent, his assertion of title to the property could not injure the creditors, because they could enforce collection from him. There was no pretense in the answer in estoppel that he was not solvent. As was said in *Anderson v. Hubble*, 93 Ind. 570, at page 578: "A settled rule of pleading is that estoppels must be especially pleaded and pleaded with great particularity and precision, leaving nothing to intendment."

In *Fletcher v. Holmes, supra*, it is said: "The door is shut against asserting a right when that would result in doing an injury by the person asserting it to some other person." And in *Anderson v. Hubble, supra*, at page 578, it is said: "It is quite clear that one who has not parted with value or has not placed himself in a position where he would suffer loss, can have no

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just right to conclude his adversary from averring the truth."

To the same effect are *Maxon v. Lane*, 124 Ind. 592; *Wisehart v. Hedrick*, 118 Ind. 341; *Babcock v. Peoples' Savings Bank*, 118 Ind. 212; *Stringer v. Northwestern Mut. Life Ins. Co.*, 82 Ind. 100.

And so in the case at bar, there is no averment in either of the answers in estoppel of the insolvency of the appellee, Mrs. Klinsick, or any reason stated why A. Kiefer & Co. could not have enforced collection of their debt from her. The assertion of title by her to the goods was equally an assertion that she was their debtor.

While we do not mean to approve of all that was said in *McGirr v. Sell*, yet we cannot say that a wrong conclusion was reached on the facts disclosed in the answer.

It follows from what we have said, that the circuit court did not err in overruling the motion for a new trial.

Judgment affirmed.

Filed December 17, 1895; petition for rehearing overruled February 20, 1896.

No. 17,597.

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APPEAL.—Drainage Proceeding.—County Commissioners.—Alleged errors of the board of county commissioners in proceedings for a public ditch, cannot be considered on appeal from a judgment of the circuit court on appeal from a decision by the county commissioners.

SAME.—Drainage Proceeding.—Motion to Dismiss Petition.—Alleged error in overruling a motion to dismiss a petition for drainage on

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a first appeal to the circuit court from the decision of county commissioners, in which the complaining party succeeded, will not be considered on appeal from a final judgment of such court on a subsequent appeal from the proceedings of such board.

DRAINAGE.—Location of Ditch.—Constructing Diagonally Across Land.—Discretion of Viewers.—A public ditch may be constructed diagonally across land, where it is the most eligible route in the discretion of the viewers, under section 5659, R. S. 1894, requiring the viewers, where it will not be detrimental to the usefulness of the work to locate the ditch on boundary lines, and, so far as practicable, to avoid laying the same diagonally across lands, but not to sacrifice the general utility of the ditch for such purpose.

BURDEN OF PROOF.—Drainage Assessment.—The burden of proving that assessments made by viewers in proceedings to construct a public ditch, are not in proportion to the benefits, rests upon a remonstrant.

WITNESS.—County Assessor.—Drainage.—A county assessor who is also a viewer in proceedings to construct a public ditch, is competent to testify as to the value of lands to be affected by the proposed drainage.

VERDICT.—When Responsive to Issues.—Drainage.—A verdict in the circuit court on the trial *de novo* of proceedings to open a public ditch, that the jury find for the petitioners, and that the proposed ditch will be of practical utility and conducive to public health, and that the assessments in the viewers' reports are in proportion to the benefits derived, and that no damages should be allowed a specified person—is responsive to the issues allowed by section 5671, R. S. 1894, authorizing an appeal to be taken.

APPELLATE PROCEDURE.—Instruction.—Drainage.—Damages and Benefits.—An instruction that in determining the damages from digging a ditch, the value of any benefits shall be deducted therefrom, is not ground for reversal on the ground that the benefits might have exceeded the damages, where no instruction in that regard is asked.

From the Jackson Circuit Court.

W. T. Branaman and O. H. Montgomery, for appellant.

Applewhite & Applewhite, for appellees.

HOWARD, J.—This action was begun before the board of commissioners of Jackson county, on a petition by appellees for a public ditch. The viewers ap-

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pointed made their report in favor of the establishment of the ditch.

The appellant, on the overruling of his motion to dismiss the proceedings, filed a remonstrance, upon which reviewers were appointed, who also reported in favor of the work. On the overruling of a motion by appellant to set aside the report of the reviewers, the board entered an order for the establishment of the ditch as prayed for.

From this order appellant took an appeal to the circuit court, where his motion to dismiss the action was renewed and overruled by the court. His motion to refer the case back to the board for another review was, however, sustained, and reviewers were accordingly reappointed by the board. The reviewers again reporting in favor of the work, the board entered another order for its establishment. The appellant again appealing to the circuit court, the cause was submitted to a jury, and a verdict returned in favor of the establishment of the ditch; and judgment was entered accordingly. On the overruling of appellant's motion for a *venire de novo* and his motion for a new trial, this appeal followed.

Among the assignments of error, appellant has included certain alleged erroneous rulings of the board of county commissioners. These assignments, however, cannot be considered. The appeal is from the judgment of the circuit court, and only the action of that tribunal can be here reviewed.

The first error assigned on the rulings of the court is the overruling of appellant's motion to dismiss the petition for drainage.

An examination of the record, however, fails to show the making of such motion by the appellant or any ruling of the court thereon. It is true that such a motion was made and overruled on the first appeal

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to the circuit court from the board of county commissioners. But the last appeal is quite distinct from the first. The appellant prevailed on the first appeal, and the cause was returned to the county board. The appeal to this court is from the final judgment in the court below; and that judgment was rendered upon the verdict of the jury on the trial of the questions raised on the second appeal from the county board. There is, therefore, no question presented by this assignment of error.

The next assignment of error is the overruling of appellant's motion for *venire de novo*.

The reasons given in the motion for *venire de novo* are: "That the verdict of the jury is not responsive to the issues involved; does not cover all the issues joined; and is so uncertain, indefinite and defective that no judgment can be rendered thereon."

An examination of the verdict fails to bear out the reasons thus given.

The statute, section 5671, R. S. 1894 (section 4301, R. S. 1881), prescribes the matters upon which an aggrieved party may take an appeal from the county board in such cases:

"First. Whether the ditch will be conducive to the public health, convenience or welfare.

"Second. Whether the route is practicable.

"Third. Whether the assessments made for the construction of the ditch are in proportion to the benefits to be derived therefrom.

"Fourth. The amount of damages allowed to any person or persons or corporation."

The verdict reads as follows: "We, the jury, find for the petitioners, and that the proposed ditch, in respect to both proofs thereof, will be of practicable utility, will be conducive to public health, and the assessments made and set down in the viewers' report

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herein are in proportion to the benefits derived. We find that the defendant, Daniel Wilson, should be allowed no damages. We find that such ditch should be in all its parts established and constructed as set down in such viewers' report."

We think this verdict responsive to the issues allowed by the statute to be tried on such appeal; and that it is neither uncertain nor defective, but amply supports the judgment rendered upon it by the court. See *Steele v. Empson*, 142 Ind. 397.

The last alleged error assigned and discussed by counsel is the overruling of the motion for a new trial.

The jury found that the appellant would not be damaged by the construction of the ditch; and this conclusion, we think, was fully warranted by the evidence.

It is true that one branch of the ditch runs diagonally across a part of appellant's land; but we are satisfied from the evidence that this was the most eligible route for the drain, as it was along the low ground and on the most direct line. The question was, in reality, one for the discretion of the viewers. The provision of the statute in this regard, found in section 5659, R. S. 1894 (section 4289, R. S. 1881), is as follows: "And when it will not be detrimental to the usefulness of the whole work, they (the viewers) shall, as far as practicable, locate the ditch on the division lines between lands owned by different persons; and they shall, as far as practicable, avoid laying the same diagonally across the lands, but they must not sacrifice the general utility of the ditch to avoid diagonal lines."

It was said in *Metty v. Marsh*, 124 Ind. 18, a case brought under the same statute as the case at bar, that, "It is the duty of the viewers to locate the ditch or drain upon such line as they may deem best to ac-

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comply with the object sought, varying from the line described in the petition to such a degree as may be necessary to locate the ditch at a place where it will, in their judgment, accomplish the most good."

So, in *Zigler v. Menges*, 121 Ind. 99, it was said: "Whether it is practicable or expedient to construct a ditch upon the route proposed is a matter to be determined by the officers to whom the authority to locate ditches is entrusted."

Counsel also contend that the finding of the jury that the assessments as made in the report of the viewers are in proportion to the benefits, is not sustained by the evidence. The report of the viewers, however, was before the court, with the approval of the reviewers and also of the county commissioners. The report will therefore stand unless overthrown by the evidence. The burden was upon the remonstrant to show the error, if any, in the report. *Daggy v. Coats*, 19 Ind. 259; *Metty v. Marsh*, *supra*; *Denton v. Thompson*, 136 Ind. 446.

As if in contradiction of the foregoing contention, the appellant contends that the court erred in refusing to allow him to open and close in the trial court. The trial in the circuit court was not in the nature of an appeal from errors in the commissioners' court, but was a trial *de novo*, upon the petition and reports of such matters as were litigated before the commissioners. The relations of the parties were not changed. It is true that the petitioners, having brought a *prima facie* case in their favor from the commissioners' court, were not required to adduce further proof or argument in support of their case; but they still remained the plaintiffs, with the right to the opening and closing. It was for them to present their case to the court, with evidence and argument if they

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saw fit, and then for the remonstrant, if he saw fit, to attempt the overthrow of the case so made.

It is argued that the court erred in overruling appellant's motion to strike out the testimony and opinion of William H. Thomas as to the value of appellant's lands to be affected by the proposed drainage. Thomas was one of the viewers and was also county assessor. We do not think the court abused any discretion in refusing to strike out his testimony. The weight to be given to the evidence so admitted was for the jury.

The exclusion of certain evidence offered by appellant to show the practicability of another route than that fixed upon by the viewers, is objected to by appellant. The question, however, was whether the route selected was practicable, not whether some other route might not be more practicable. This, besides, as we have before shown, was a question entrusted to those designated by law to locate the ditch; and, in the absence of fraud or a gross abuse of discretion, their action will not be reviewed by the courts. See *Bonfoy v. Goar*, 140 Ind. 292, and authorities cited.

Other alleged errors, chiefly relating to instructions given to the jury, have, as we think, been sufficiently considered in what we have already said. The questions so raised are settled against the contentions of appellant by the decisions of this court above cited.

The judgment is affirmed.

Filed December 10, 1895.

ON PETITION FOR REHEARING.

HOWARD, J.—The appellant, after rearguing the questions which were fully considered at the original hearing, says that we failed to consider the objections made to the instructions given by the court

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on the trial, and particularly the objections to instruction number 7. In this instruction, the court, after informing the jury as to the measure of damages to appellant's land, added: "If you find any damages in Wilson's favor upon the measure therefor herein stated, you should include all damages present and prospective, deducting, however, any value of benefits to be by him derived, present or ultimately, by the establishment of the ditch."

This instruction we think right so far as it goes. If, however, appellant was of opinion from the evidence that Wilson's benefits were greater than his damages, and that in such case the jury should be informed that the damages should be deducted from the benefits, he should have prepared instructions covering that point and asked the court to give them to the jury.

It is the difference between the benefits and damages to any particular piece of land that gives the net or real benefit or damage which should be assessed to that land.

So it is said in section 3635, R. S. 1894 (section 3172, R. S. 1881), in relation to opening or vacation of streets: "In cases where both benefits and damages shall be assessed upon the same real estate, or to the same person or persons, the benefits, if less than the damages, shall be deducted from the assessment of damages."

And in section 5660, R. S. 1894 (section 4290, R. S. 1881), the "damages" referred to in relation to drainage, which shall be assessed to the parties owning the lands benefited, mean the actual damages left, if any, after deducting the benefits. If, to use appellant's figures, his damages were \$272 and his benefits \$271, his real damages would be \$1, and this should be

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paid by the parties benefited. So, also, the benefits which an owner shall be assessed are the net benefits after deducting all the damages, if any, which he may suffer.

On careful consideration of the case, we do not find that the trial court committed any available error.

The petition is overruled.

Filed February 20, 1896.

No. 17,610.

ALEXANDER ET AL. v. JOHNSON.

EVIDENCE.—*Admission of Proceedings of Board of School Trustees.*

—*Parol Testimony.*—*Appellate Procedure.*—A party cannot object to the admission of the proceedings of a board of school trustees because it is merely signed by the secretary, where he has objected to the admission of parol testimony of the contents thereof on the ground that the record is the best evidence.

SAME.—*Competency.*—*Discretion of Trial Court.*—Whether the record of the transactions of a board of school trustees, signed merely by the secretary, is sufficient to show the making of an alleged illegal contract, is to be determined by the trial court.

INJUNCTION.—*Illegal Contract.*—*Board of School Trustees.*—That the execution of an illegal contract by a board of school trustees for the payment of money to one of its members would constitute a cause of action upon the bond of such member, does not afford an adequate remedy at law, so as to defeat an action by a taxpayer to enjoin the threatened execution of such contract.

SAME.—*Taxpayer, Who is.*—*Suit to Enjoin Misapplication of Public Funds.*—An owner of property which has been entered for taxation, who is liable to pay the taxes thereon as soon as they are collectible by law, is a taxpayer of a town within the meaning of the statutes permitting an action by a taxpayer to enjoin the misapplication of public funds, although he has not resided long enough in the town to actually pay taxes.

144	82
160	459
144	82
162	197

144	82
165	271

144	82
171	283

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SAME.—*Illegal Contract.—Public Funds.—Board of School Trustees.—When Action Will Lie.*—An action by a taxpayer to enjoin the board of school trustees from executing an illegal contract, providing for the paying out of public funds contrary to law, will lie as soon as the steps necessary to the consummation of such illegal purpose have been taken; and it is not necessary to wait until the board is disbursing the money.

From the Washington Circuit Court.

Allspaugh & Lawler, for appellants.

Elliott & Hostetter, for appellee.

HOWARD, C. J.—From the special finding of the facts by the court, it appears that at the institution of this suit by appellee for an injunction against appellants, the appellee was a resident tax payer of the town of Salem, in Washington county; and that the appellants were the school trustees of said town. It further appears that at a meeting of said school trustees, held November 8, 1894, the board, after the transaction of its business, “adjourned until November 12, 1894, for the purpose of considering bids for furnishing coal for use in the schools of said town;” that the board met pursuant to adjournment, and received the bids for coal; that one bid was that of Johnson Bros., of which firm appellee was a member, in which bid said firm offered to furnish coal for \$3.65 per ton; another bid was by one L. W. Sinclair, for \$4 per ton; and a third was by William R. Alexander, one of the appellants, also for \$4 per ton; that two of the trustees, being a majority of the board, and one of them being Alexander himself, voted to accept Alexander’s bid, and the contract was awarded to him; that said acts and facts were duly entered of record upon the minute book of said school board, and not rescinded.

From the facts found, the court concluded that an

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injunction should issue, as prayed for, forbidding the school board from purchasing or paying for coal from Alexander while he is a member of the board. Judgment was entered accordingly.

The contract, if entered into, would be void, as counsel admit, both as against public policy, and also as against the letter of the statute, which makes such a contract between an official and himself as an individual, a felony. Section 2136, R. S. 1894, (section 2049, R. S. 1881); *Wingate v. Harrison Tp.*, 59 Ind. 520; *Case v. Johnson*, 91 Ind. 477; *Benton v. Hamilton*, 110 Ind. 294.

But, say counsel, the contract was not consummated; the findings do not show that the board was threatening to consummate it, or to pay any money on it to Alexander; the finding that appellee was a tax payer is not supported by the evidence; and even if the contract should be carried out, the tax payers had a remedy at law by suing Alexander on his official bond.

Appellee was the owner of property which had been entered for taxation, and he was liable to pay the taxes thereon as soon as taxes were collectible by law. He was a taxpayer in the sense in which the word is used in the statutes. That he had not yet resided long enough in the town to have actually paid taxes can make no difference. He was liable for taxes, and had a right to bring the suit for injunction against a misappropriation of the public moneys.

That the board was threatening to pay out the public funds contrary to law, and that it was about to do so, sufficiently appear from the facts found. All the steps had been taken for that purpose. It was not necessary to wait until the moment when the board should be in the act of handing out the money.

We do not think that a suit on the trustee's bond

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would have been an adequate remedy in this case. The law for the protection of the public funds would have been violated, and the funds themselves illegally diminished; there might be no recovery on the bond, even if judgment should be obtained. It is true, as said in *Watson v. Sutherland*, 5 Wall. 74, cited in *Thatcher v. Humble*, 67 Ind. 444, that, " 'If the remedy at law is sufficient, equity cannot give relief, but it is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity.' " See also *Middleton v. Greeson, Tr.*, 106 Ind. 18; *Bishop v. Moorman*, 98 Ind. 1; *Harney v. Indianapolis, etc., R. R. Co.*, 32 Ind. 247; *Board, etc., v. Markle*, 46 Ind. 103.

It is urged that the record of the transactions of the board of school trustees in relation to the contract for coal was insufficient, inasmuch as it was merely signed by the secretary; and that it should not, therefore, have been admitted in evidence. That it was a record of the proceedings of the board is not denied. Whether it was sufficient for the purposes for which it was introduced in evidence was for the trial court to determine. In any event, appellants are in no position to deny its sufficiency. Appellee offered to prove the facts as to the proceedings of the board by the testimony of the secretary; but counsel for appellants objected, for the reason that the record was the best evidence. We think counsel were right in this, and that the record as introduced was sufficient.

Other alleged errors we do not think need be considered. The complaint was good, and the findings were sufficient and were supported by the evidence.

The judgment is affirmed.

Filed November 1, 1895; petition for rehearing overruled February 20, 1896.

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No. 17,557.

LYNCH v. ROSENTHAL.

CONTRACT.—Lottery.—Public Policy.—Sale of Lots.—A sale of lots, to be drawn by the purchasers and the advantages of location, character, size, or condition as between lots of the same class, to be determined wholly by lot, while one prize lot was to be given to some one of the purchasers as the result of chance, is contrary to public policy and void.

SAME.—Specific Performance.—Estoppel.—Illegal Contract.—In an action to enforce such a contract of sale against a purchaser, the defendant is not estopped from exposing the vice of the contract, although he did not urge it as a defense prior to the suit.

From the Adams Circuit Court.

Mann & Beatty, La Follette & Adair and France & Merryman, for appellant.

R. K. Erwin and J. R. Bobo, for appellee.

HACKNEY, C. J.—This was a suit by the appellant against the appellee for specific performance of a contract for the purchase of real estate. The material features of the contract were that Lynch held a contract for the purchase of a tract of land lying adjacent to the corporation line of the city of Decatur, in Adams county, which land he was about to plat as an addition to said city, in accordance with a diagram then drawn and made a part of the contract, exhibiting fifty-four lots. The appellees and others agreed severally by the express provisions of that contract, to purchase of said first party (Lynch) the number of lots indicated by the number placed opposite 'his name' on the following conditions, to-wit: "The price of said lots shall be the same as shown by the annexed plat," the prices varying according to classes and loca-

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tions, "and whenever all of said lots are sold, except the six lots * * marked 'reserved' * * and the lots marked 'to be given away,' then said second parties shall meet and determine by lot the number of the lot or lots to be awarded to each respective subscriber, and shall also determine in some manner, to be agreed upon by themselves, the manner of awarding the prize lot; as soon as said lots are awarded and it is determined in whom the respective ownership shall lie, then the said Allen T. Lynch shall make out and deliver to each party a good and sufficient warranty deed for each of said lots, to each of said subscribers." It is further stipulated that one-half of the purchase price for any lots shall be paid or secured when the deed is delivered and the other half when Lynch may build and put in operation, near the lots, a furniture factory of the character therein described. There were thirty-five subscribers for one lot each, the appellee being one of that number.

Each of the three paragraphs of complaint alleges subscriptions for less than the whole number of lots for sale under said contract, and the waiver, by all parties, of any requirement to sell all of such lots; that all of the subscribers, including the appellee, met and determined by lot which of the platted lots should be designated for conveyance to each subscriber, including a described lot for the appellee. And it is alleged in detail that the appellant complied with the requirements of the contract on his part; that he executed the required deed of conveyance to the appellee and tendered it to him and upon his refusal to accept it the same was brought into court for him.

To the complaint the appellee filed seven answers in bar, the 3d, 4th, 5th and 6th of which were sustained, against the appellants' demurrer, and are here assigned as severally insufficient.

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The third answer pleads that all the lots agreed to be sold were not sold and that the stipulation as to the sale thereof was not waived. This much of the answer presents the same question arising upon the sixth paragraph of answer. Counsel offer no objection to the sufficiency of either of these paragraphs in this respect, and we observe no objection to them. If all of the lots had gone into the hands of separate *bona fide* purchasers their prospective value would certainly have been greater than if but few had been sold and a large number left in the hands of a single owner. But, in addition to this feature of the third paragraph it alleges that, after said subscriptions were made, the appellant and a number of subscribers met and upon the suggestion and assistance of the appellant and his attorney, certain of said fifty-four lots were awarded to the subscribers severally by placing the numbers of lots severally upon tickets and placing them in a box, and then by placing the names of the subscribers severally upon tickets and placing them in another box, whereupon two persons, who were blindfolded, drew simultaneously from the boxes a name and a number of a lot until all of the names were drawn; that in each instance the lot whose number was drawn, when a name was drawn, was awarded to the subscriber whose name was so drawn and constituted the selection of the lot to be conveyed to him; that at the same time and in the same manner said persons awarded the prize lot to one of the subscribers, that is to say: they placed in one box thirty-four blank tickets and one ticket marked "prize lot," and in the other box tickets containing severally the names of the subscribers, and as names were drawn from one box tickets were drawn from the other until the name of one subscriber and the ticket bearing the "prize lot" ap-

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peared simultaneously, when that lot was awarded to such subscriber and was thereafter conveyed by appellant to him. The contract and the manner of its attempted execution are alleged to have been void as against public policy.

The fourth answer alleged that the prices of the lots as marked upon the plat were in excess of the actual values of the lots and that the appellant, as an inducement to persons to subscribe, offered the chance of obtaining the prize lot in addition to that subscribed for; that appellant participated in the drawing which was described as in the third paragraph.

The fifth answer alleged the stipulations of the contract as to the selection of the lots subscribed for and the awarding of the prize lot; that the lots were not of the values placed upon them and that the values of those in any class were variant, so that one person drawing at lot, at a given price, might obtain one of greater or less actual value than that obtained by another subscriber drawing one of the same price.

Appellant's learned counsel have not discussed their objections to these answers separately, but they have attacked them collectively as not disclosing the invalidity of the contract. They will be regarded, therefore, as having waived all other questions arising upon them.

The argument is not made that contracts tainted with the vice of lottery schemes are enforceable. That such contracts are against public policy and that those who have entered into them shall have no relief, in the courts, to enforce those that are executory or to recover that which has passed under such as have been executed, is without doubt. Section 15, Art. 8, State Const.; *Burger v. Rice*, 3 Ind. 125; *Swain v. Bussell*, 10 Ind. 438; *Rothrock v. Perkinson*, 61 Ind.

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39; *United States v. Olney*, 1 Abb. 275; *Whitney v. State*, 10 Ind. 404; *Crews v. State*, 38 Ind. 28; *Hudelson v. State*, 94 Ind. 426; *Riggs v. Adams*, 12 Ind. 199; Am. and Eng. Ency. of Law, p. 1187; R. S. 1894, sections 2170, 2171, 2172 (R. S. 1881, sections 2076, 2077, 2078).

The important question here is as to the character of the present contract. Does it infringe this principle of public policy? This inquiry depends upon what a lottery scheme is. In *Hudelson v. State*, *supra*, it was held that where a merchant, with each sale of merchandise to the value of 50 cents, gave the purchaser the right to guess as to the number of beans in a glass globe, the nearest guesser to receive a gold watch, the transaction was a lottery. The court there quoted with approval several definitions of a "lottery," some of which are as follows: "Whether the enterprise * * be called a scheme of chance, a gift enterprise, or a lottery, it is still a scheme of chance, and in that sense a lottery or gift enterprise. *Lohman v. State*, 81 Ind. 15." "Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what, and how much he who pays the money is to have for it, that is a lottery." *Hull v. Ruggles*, 56 N. Y. 424. "A lottery is a scheme for the distribution of prizes by chance." In *Rothrock v. Perkinson*, *supra*, it was said: "It is well settled in this State that every scheme for the division or disposition of property or money by chance, or any game of hazard, is prohibited by law, and that every contract or agreement in aid of such a scheme is void as against public policy," citing, in connection with some of the cases we have cited, those of *Higgins v. Miner*, 13 Ind. 346; *Thatcher v. Morris*, 11 N. Y. 437. Lot is defined to be "a contrivance to determine a question by chance, or without the action of man's

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choice or will." *Chavannah v. State*, 49 Ala. 396; Am. and Eng. Ency. of Law, p. 1181. Webster's International Dictionary defines *lot* as "Anything used in determining a question by chance, or without man's choice or will."

That the property subject to distribution possesses unequal values, so that one's good or ill luck, in the scheme of distribution, may determine whether he shall receive more or less for his investment, the scheme is a lottery. *Dunn v. People*, 40 Ill. 465. Nor is it less a lottery because the person whose property is distributed, or the person who pays, does not personally participate in the drawing. *Fleming v. Bills*, 3 Ore. 286; *Riggs v. Riggs*, *supra*.

By the definite language of the contract in this case the lot which the appellee agreed to purchase was to be determined by lot. It was to be one of the fifty-four parcels, to be designated wholly by chance and without the will or choice of the appellant or the appellee. Whether he was to pay \$100 or \$300 was a question over which he had no choice, and the appellant was without control. Any advantage in the selection, by reason of location, character, size or condition of a lot, from any of the various classes as arranged by the prices marked, was not to be determined by the judgment of a subscriber or the seller, but depended wholly upon the chances to be settled by "lot," as the contract provided. Distribution by chance was never more certainly contemplated, and if not so contemplated, the manner in which the appellee's alleged purchase was determined was never outrivaled as a method of chance, not even by the guessing upon the number of beans in the globe, for in that instance the person to be benefited exercised his own judgment in determining upon a number. The method adopted was no less objectionable, as one of

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mere chance, than the methods of the old Louisville Library Association, or the more recent Louisiana Lottery. If there had been nothing in the contract directing the choice by lot and the choice had been made in the manner alleged in some of the answers every objection would prevail against it that would obtain if the appellee had been assigned a lot as the result of a game of cards, the throwing of dice or the turning of the roulette. In any one of these methods the result depends entirely upon chance and excludes the exercise of the judgment.

In the case of *Swain v. Bussell*, *supra*, this court quoted with approval from *State v. Clark*, 2 Fogg (33 N. H.) 334, "that where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what the party who pays the money is to have for it, or whether he is to have anything, is a lottery." In the present case the subscriber is to get a lot more or less valuable, depending alone upon chance, and he is to pay for it a sum, more or less, depending alone upon chance. It was further said by this court, in the case mentioned, referring to *Den ex Demise Wooden v. Shotwell*, 3 Zab. (N. J.) 470: "Wooden had divided a parcel of land into fifty-eight lots of unequal value, from \$50 to \$600 per lot, and disposed of them at \$75 each; and the particular lot of land to which each person was to receive a title was determined by lot. The supreme court of New Jersey say this was, both in form and substance, a lottery." The difference between that case and the present is merely in degree of advantage or disadvantage to the parties in the amount to be paid and the proportionate values to be received as between those who make the payments. The method of distribution in either involves the objectionable feature of chance, upon which property of

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higher or lower value and greater or less price is determined without the exercise of the will and judgment of the parties.

The manner in which the chances in this case were determined is even more objectionable. Here fifty-seven lots were made the subject of choice for the selection of but thirty-five lots, and thereby added to the objection of distributing thirty-five lots by chance, the further vice of placing the appellant's remaining twelve lots in the scale and his ownership, with locations, character and values all depending upon the result of the drawing.

Another feature of the contract and the manner of executing it is in the offer and award of the "prize lot." Counsel for appellant seek to eliminate this feature of the contract and to uphold that which remains by insisting that this lot was a gift to all of the subscribers without contract, that it should go to any one by lot. If this were true and the appellee was denied the benefit of that part of his contract by the appellant's conveyance to one of the subscribers in violation of the contract, we are at a loss to determine how he, the appellant, is in a position to insist upon the enforcement of a contract which he has violated and rendered impossible of complete execution. But we do not agree with this view of the contract. It is stipulated that a "prize lot" is "to be given away" and is to be "awarded" in a manner to be determined. It is not stipulated that all of the subscribers shall become the owner of this lot nor, in fact, that any one of them shall, but, when the parties come together, with the knowledge and consent, if not the direct participancy of the appellant, the contract is construed to mean that the prize lot is to be awarded to some one of the subscribers who, by the result of chance, is proven to possess the luck to have his name

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and the "prize lot" ticket drawn simultaneously. This construction of the contract is ratified and acted upon by the appellant in the act of conveying the lot to the lucky subscriber.

This construction of the contract renders certain that doubtful part of it which omitted to stipulate the person to whom and object for which the "prize lot" was to be awarded. It was to increase the interest of a subscriber who, by subscribing for one lot, had the chance, for the same money, to get two lots. We find, therefore, that both the contract and the manner of attempting to comply with its terms were against good morals, forbidden by public policy and void.

Appellant insists that the lower court erred in sustaining a demurrer to his reply to these answers, in which reply he alleged that when he tendered appellee's deed it was declined, not because the transaction was against public policy and void, but for the reason, then stated by him, that appellant had not complied with the requirement of the contract as to the building of a factory. Authorities to the proposition that one may not assert one defense out of court and another in court, to the prejudice of the complaining party, are cited. We do not stop to consider the true doctrine of these cases. It is enough to say that one who asks equity must present clean hands in which to receive it. Here the appellant, from the beginning, had unclean hands. He originated, carried forward and in this suit sought to enforce a vicious contract. He is in no position to ask that equity estop his ally from exposing the vice of that contract, the enforcement of which public morals forbid. The evidence supports the judgment of the circuit court. There is no error in the record and the judgment is affirmed.

Filed February 21, 1896.

Smith et al. v. Newbaur et al.

No. 17,618.

144 95
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SMITH ET AL. v. NEWBAUR ET AL.

CONSTITUTIONAL LAW.—Due Process of Law.—Mechanic's Lien.—Statute Construed.—Section 7257, R. S. 1894, providing that a mechanic's lien may be acquired by filing in the recorder's office a notice of intention to hold the lien, within sixty days after performing labor or furnishing material, is not unconstitutional as depriving the owner of his property without due process of law.

MECHANIC'S LIEN.—For Materials Furnished to Contractor or Subcontractor.—A lien may be acquired for materials furnished for a building to either a contractor or subcontractor, under section 7255, R. S. 1894, placing them in the same category, so far as the right to acquire a lien is concerned.

SAME.—For Materials Furnished.—Destruction of Building Before Notice.—The lien on land for materials furnished for use in a building thereon is not lost by the destruction of the building by fire before notice of intention to hold the lien is filed.

SAME.—Notice, Sufficiency Of.—Misdescription.—A notice of intention to hold a lien for materials used in a building, which describes it as a part of a specified out-lot in "Haney's" addition of out-lots, to a specified town, is sufficient, although the addition is "Henley's," where the location of the building on the specified out-lot in Henley's addition is well known, and the owner knew what property was intended to be described in the notice, under section 7257, R. S. 1894, declaring that any description of the lot from which the land can be identified, will be sufficient.

PLEADING.—Complaint to Foreclose a Mechanic's Lien.—Sufficiency.—A complaint alleging that both contractors and subcontractors purchased of plaintiffs materials for use in the construction of the building on which a lien is sought to be foreclosed, which materials were "used" in its construction, sufficiently alleges that the materials were purchased for use in the building—especially where a bill of particulars and the notice of intention to file the lien, which are made a part of the complaint, show that the materials were furnished to the contractors and subcontractors to be used in the building.

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From the Blackford Circuit Court.

Carroll and Dean, for appellants.

J. Cantwell, S. W. Cantwell and L. B. Simmons,
for appellees.

HOWARD, C. J.—This was an action for the foreclosure of a mechanic's lien, brought by appellees against appellants. There was a trial by the court and a finding and decree in favor of the appellees.

The errors assigned and argued on this appeal call in question the correctness of the court's action in overruling the demurrer to the complaint, in overruling the motion to strike out parts of the complaint, and in overruling the motion for a new trial.

The complaint shows that appellants entered into a contract with a firm named Challenger & Carey for the erection of a dwelling house on premises owned by appellants, the contractors to furnish all materials for the building; and that the contractors sublet a part of the work to another firm, named Sanders Brothers, who were to furnish all materials in the part constructed by them. The appellees furnished the materials used by both contractors and sub-contractors. A bill of particulars, showing the materials furnished, and also the dates of the several items, is made a part of the complaint; as is also a copy of the notice to hold a lien, filed in the recorder's office.

The action was brought under the provisions of the mechanic's lien law of 1883 (Acts 1883, 140), as amended by the act of 1889 (Acts 1889, 257), and by the act of 1891 (Acts 1891, 28), section 7255, R. S. 1894, (section 1688, Ell. Supp.), and following sections.

In support of the demurrer to the complaint, it is first contended that the mechanic's lien law of this State is invalid, as repugnant to section 1, Art. 14, of

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the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property, without due process of law. This contention is based upon the provisions of section 8 of the mechanic's lien law (section 7557, R. S. 1894; section 1690, Ell. Supp.) which provides that any person wishing to acquire such a lien upon any property shall file in the recorder's office, "at any time within sixty days after performing such labor or furnishing such materials," notice of his intention to hold such lien.

This notice, the only one provided for in the statute, is insufficient, say counsel, to secure that due process of law referred to by the Federal Constitution before the fixing of a lien upon the citizen's property. Under the law as enacted, counsel contend, any one may perform labor or furnish material in the construction of a building for a land owner, without such owner's knowledge or consent, and then secure a lien upon the land and building by notice filed after the work is done or materials furnished. It is said that the property owner should have notice at or before the doing of the work or the supplying of the materials, so that he may, if he wishes, prevent the doing of such work or the furnishing of such materials, and so keep his property free of the lien.

It has often been held that every statute under which a contract is made enters into and forms a part of such contract. The appellants, in the contract for the erection of the dwelling house upon their property, are therefore chargeable with knowledge of, and are bound by, all of the provisions of our mechanic's lien law then in force. By the terms of the agreement entered into, the contractors were to furnish all materials necessary for the construction of the building.

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This was notice that such materials were to be furnished; and the law under which the contract was made was further notice that the building and ground upon which it was to be erected would be liable to a lien for the value of the materials so furnished. The only uncertainty left was whether those who should furnish the material would claim the lien therefor. That uncertainty is provided for in the statute, which requires that the notice of intention to hold the lien be filed in the recorder's office within sixty days. The owner has, consequently, ample means of protection, and is not liable to a lien without notice, nor to have his property taken without due process of law.

It is intimated that the law hampers the freedom of action of the property owner; that he may desire to pay the contractor in advance, or to pay him by an exchange of other property for the erection of the building; and that it may be an inconvenience, or induce the contractor to bid higher for the work, if payment is to be delayed for sixty days after the work is done. These, however, are considerations that should be addressed to the legislature, and not to the courts. Besides, it is to be remembered that without the right to a lien on the property, laborers and materialmen would, in many cases, have no security for their toil or the materials furnished by them. The laborer is worthy of his hire, and the seller of goods ought to be paid for them. As the law stands, all parties are secured in their rights. The owner, by seeing that laborers and materialmen are paid, or by keeping back for sixty days from the contractor sufficient to make such payment, is in no danger of having to pay twice for his building; while at the same time the man whose labor or material has gone into the building can look to the building itself and

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to the ground upon which it stands for his security. The property-owner enjoys the benefit of this work and of this material; and it is but just that he should be charged, for at least sixty days, with the responsibility of seeing that they are paid for.

It is next urged that the complaint is insufficient as not alleging "that the plaintiffs sold the material to the contractors and sub-contractors, respectively, to be used in the building against which the lien is sought to be enforced."

The allegations as to both contractors and sub-contractors are that they "purchased of the plaintiffs cement and other materials for use in the construction and erection of said building, of the value of, etc., * * * which said materials so furnished by the plaintiffs to said * * [contractors and sub-contractors] were by them used in the construction of said building." The bill of particulars and the notice of the intention to file a lien, each made a part of the complaint, also show that the materials were furnished "to the contractors and sub-contractors to be used in the building against which the lien is sought to be enforced." It would be extremely technical to hold that materials alleged to have been purchased for use in the building were not thereby shown to have been sold to be used in the building; particularly when it is alleged that the materials were actually so used.

A third reason advanced to show that the demurrer should have been sustained to the complaint is, that the notice of intention to hold a lien does not contain a sufficient description of the property.

The complaint alleges a mistake in the description as stated in the notice, and asks for a reformation. The real estate was described in the notice as a part of out-lot number 21, in Haney's addition of out-lots to the town of Hartford City; whereas it should have

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been a part of out-lot number 21, in Henley's addition of out-lots to the town of Hartford City. It is alleged that there is no such tract of ground as out-lot number 21, in Haney's addition of out-lots to the town of Hartford City; that the location of the house as on out-lot 21 in Henley's addition of out-lots to the town of Hartford City was well known; that said contractors never contracted to erect any other building for appellants in the town of Hartford City; and that said building was the only dwelling house erected by any one for appellants in said town at any time within the past ten years. It is further alleged that the notice of the lien was filed by appellees at the suggestion and request of appellants, and that the appellants then well knew, and still know, that the property intended to be described in said notice was the property in question.

The statute providing for notice, *supra*, section 7257, R. S. 1894, declares that "Any description of the lot or land in a notice of lien will be sufficient if from such description or any reference therein the lot or land can be identified." In the case before us, the reference in the notice to the building and to the appellants as owners might sufficiently identify the lot. It has been held, in addition, that indefinite descriptions of property in such notices may be aided by extrinsic evidence under proper averments. *White v. Stanton*, 111 Ind. 540. See also *Newcomer v. Hutchings*, 96 Ind. 119; *McNamee v. Rauck*, 128 Ind. 59; *Coburn v. Stephens*, 137 Ind. 683.

We think that, under our liberal statutes and decisions in relation to mechanic's liens, the description may be considered sufficient, at least as to a party to the building contract, who also himself suggested the filing of the notice.

Counsel next claim that the court erred in overruling

appellants' motion to strike out parts of the complaint. The parts of the complaint which appellants desired to be stricken out relate to the materials furnished to the sub-contractors. The items ordered by the sub-contractors were furnished by appellees before the furnishing of all the items ordered by the contractors. All the items, however, both those ordered by the contractors and those ordered by the sub-contractors, were furnished from time to time for the building in question. We see nothing in the point attempted to be made. The statute, *supra*, section 7255, R. S. 1894, places sub-contractors in the same category with contractors so far as the right to acquire a lien is concerned, and we can see no difference in the rights of those who furnish materials to contractors and those who furnish them to sub-contractors. Both contractors and sub-contractors have the right to order materials and employ labor for buildings under contract. If the materials are furnished for the building to one who has authority to place them in it and they are so placed in the building, the right to a materialman's lien is thereby acquired. See *Barker v. Buell*, 35 Ind. 397.

A like contention is made in discussing the motion for a new trial. The account filed by appellees, although for convenience and accuracy of reference filed in two bills of particulars, is in all essentials a single account of materials furnished for appellants' dwelling; and the notice of intention to hold a lien therefor being filed within sixty days from the furnishing of the last item, the lien relates back to and includes the whole account.

Something is said as to evidence introduced to show that the building was burned prior to the filing of the notice of intention to hold the lien. We do not perceive the relevancy of this evidence as to appellees'

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lien. The building was not in appellees' care, nor were they responsible for its safety. The lien attached with the furnishing of the materials, provided only the notice was duly given. That the building should be destroyed was not anything which could affect appellees, unless, indeed, their security was thereby impaired. The lien on the land remained intact. See *Scott v. Goldinhorst*, 123 Ind. 268.

The judgment is affirmed.

Filed November 19, 1895.

ON PETITION FOR REHEARING.

HOWARD, J.—We were of opinion that the validity of the mechanic's lien law of this State was fully considered and affirmed in the original opinion. That law does not provide for depriving an owner of his property without his consent. On the contrary, the law, which enters into and forms a part of his building contract, is notice to him that his land and the building to be erected thereon are liable to a lien for the value of the labor and materials which may enter into its construction. He voluntarily contracts for this labor and material, with notice from the statute of the inchoate lien thereby authorized. The statute, moreover, in the interest of the owner, prevents the fixing of the lien unless notice be given him within sixty days from the time of the furnishing of the labor or material. His property is therefore not taken without due process of law. See *Colter v. Frese*, 45 Ind. 96.

So it is said in Phillips *Mechanics' Liens*, 3d ed. section 33a, "A statute giving a sub-contractor a direct lien is not unconstitutional as forfeiting the owner's property to persons with whom he never contracted. The owner contracts with reference to the law which gives the lien for work and labor fur-

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nished to his contractor by journeymen and others.”

It is further said by the authority cited, and in the same section, “that a provision in a mechanics’ lien law which allows a laborer, mechanic or workman, thirty days after the building is completed or the contract of such laborer, mechanic or workman shall expire or be discharged, in which to give the owner written notice that a lien is claimed for such labor and material as have been furnished the contractor, does not render the act unconstitutional. The owner may, by contract or indemnity bond, protect himself against double payment for such labor and material.” The same author, also in said section, observes: “In Wisconsin it is held that a law giving sub-contractors a lien without regard to the contract price or sum due the contractor is valid. The property has been enhanced in value by the labor and materials.” *Mallory v. LaCrosse Abattoir Co.*, 80 Wis. 170.

And, in answer to what is said by counsel for appellant on the authority of *Spry Lumber Co. v. Sault Savings Bank Loan and Trust Co.*, 77 Mich. 199, we may add, also, from Phillips on Mechanics’ Liens, same section: “The consent of the owner is the basis of a lien. His property can be taken only by his consent or default. A law which gives a mechanic’s lien for labor or materials, regardless of the contract of the owner, so that his property may be taken to pay for service he never bargained for, nor consented to, is unconstitutional.” And the Michigan statute to which counsel refer is instanced by the author as one subject to such infirmity, and hence void.

The statute in the case at bar, however, is one with reference to which appellants entered into their building contract, and according to which they consented to the lien that followed. Such consent included an

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agreement that those who should furnish to the contractors and sub-contractors the material which should go into the building might have sixty days after furnishing the same within which to give notice of their intention to hold such lien. We have no doubt of the constitutionality of the law.

As to the sufficiency of the complaint in relation to the furnishing of the material, it may be said, as was said by Judge Mitchell in *Neeley v. Searight*, 113 Ind. 316: "While the averments in that regard are not as direct and specific as they might have been, they are nevertheless sufficient. * * * Taking these averments altogether, and the inference necessarily arises that the materials were furnished for, and used in, the erection of the dwelling. *Lawton v. Case*, 73 Ind. 60."

So for the description of the property, while imperfect, yet we think it satisfies the liberal provision of the statute, section 7257, R. S. 1894 (Acts 1889, 258), that "Any description of the lot or land in a notice of a lien will be sufficient if, from such description, or any reference therein, the lot or land can be identified." There was certainly sufficient in this description to identify the lot. In fact, it was identified, and that without any shadow of doubt or uncertainty.

By force of the statute, as soon as the notice is given, the lien created at once relates back to the date when the labor was first done, or the materials first furnished. As this lien is upon the land as well as upon the building, we are therefore unable to perceive how the lien could be lost by the injury, removal or destruction of the building. The laborer or materialman is responsible for none of these things. They have not the custody or control of the property. One who worked upon the building or furnished materials for it would not, on account of the destruction

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of the property, lose his right to a personal claim against the person with whom he had contracted to do such work or furnish such material. But the statute, as we have seen, provides for a lien on the property as a security for such personal claim; and the lien no more than the claim can be lost by any injury to the building. The purpose of the statute would often be liable to be defeated, if by a removal of the building from the land, or by its destruction, the lien should also be destroyed. See Phillips *Mechanics' Liens*, sections 12 and 304a, and authorities cited. In the latter section the author says: "If the lien is once fixed on the realty, it clings to the land after the destruction of the building. Moreover, the lien attaches to the money received on the sale of the land and remnants of the mill and machinery." Citing *Paddock v. Stout*, 121 Ill. 571.

The petition is overruled.

Filed February 31, 1896.

No. 17,140.

PRICE v. GWIN, SHERIFF, ET AL.

JUDGMENT.—A judgment is not binding upon one who was not a party to the action in which it was rendered.

From the Carroll Circuit Court.

Guthrie & Bushnell and *R. P. Davidson*, for appellant.

Sellers & Uhl and *J. H. Gould*, for appellees.

MCCABE, J.—The appellant sued the appellee to re-

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strain him and others from proceeding to tear down and repair or rebuild the court house in White county, under the order of the White Circuit Court. The suit was begun in the White Circuit Court and the venue was changed to the Carroll Circuit Court. The complaint was in all respects exactly the same as that in the case of the *Board, etc., v. Gwin, Sheriff*, 136 Ind. 562 (22 L. R. A. 402), except that the plaintiff, appellant in this case, was the plaintiff as a tax payer of White county instead of the board of commissioners of White county. Appellees answered in three paragraphs. The first sets up and relies on the same orders of the White Circuit Court set forth in the complaint in the former case already mentioned; the second sets up as a former adjudication the judgment of the White Circuit Court in the case already mentioned before the same was reversed in this court. The third was a general denial. A demurrer for want of sufficient facts was overruled to the said first and second paragraphs.

The issues joined were tried by the court, resulting in a special finding of the facts on which the court stated conclusions of law against the plaintiff, the appellant, that he ought to take nothing by his suit.

The errors assigned call in question the rulings upon demurrer and the correctness of the conclusions of law.

The facts found are the same in all material respects as those set forth in the complaint and relate to and are the same transaction involved in the case of the *Board, etc., v. Gwin, Sheriff, supra*. The law declared and laid down in that case is decisive of this except one point. There is one question involved in this case not involved or decided in that. That is the ruling on demurrer and the conclusion of law as to the former adjudication. That adjudication, being at

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that time unreversed, was binding and conclusive upon all the parties thereto, yet it was not binding or conclusive upon appellant because he was not a party to it. *Glenn v. State, ex rel.*, 46 Ind. 368; *Bartlett v. Kochel*, 88 Ind. 425; *State v. Page*, 63 Ind. 209; *Faust v. Baumgartner*, 113 Ind. 139; *Denney v. State, ex rel.*, 42 N. E. Rep. 929 (31 L. R. A. 726).

It follows that the Carroll Circuit Court erred in ruling upon the demurrer and in its conclusions of law.

The judgment is therefore reversed, with instructions to the trial court to restate its conclusions of law in accordance with the law as laid down in the case of the *Board, etc., v. Gwin, Sheriff, supra*, and to render judgment accordingly.

Filed March 8, 1896.

No. 17,421.

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147	454
144	107
160	104

COUNTY.—*Court House.—Lease of Rooms for Private Purposes.*—A lease of rooms in a court house to be used for private purposes can not be lawfully made by county commissioners in the absence of statutory authority.

From the La Porte Circuit Court.

W. B. Biddle, for appellant.

M. Nye, for appellees.

MONKS, J.—This was an action by information against the Board of Commissioners of La Porte County, calling in question the power of said board of

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commissioners to lease rooms in the court house to be used for private purposes.

A demurrer to the information for want of facts was sustained, and appellant failing to plead further, judgment was rendered in favor of appellees.

The only error urged by appellant is the sustaining of the demurrer to the complaint.

It is alleged in the information that in 1832, Walter Wilson laid out and platted land upon which the City of La Porte is located and designated on the plat a parcel of ground near the center as "Public Square," and dedicated the same to be used for the purpose of erecting a court house and other public buildings required as a county seat, and that on May 1, 1834, said tract was conveyed by said Wilson to the county agent by the description of Public Square, and ever since the same has been used exclusively for public purposes; that a new court house has been erected on said square, a part of which is a basement, having three suites of rooms with a floor area of forty by sixty feet each, with all the modern improvements for heating, lighting and convenience. Before the completion of the court house the board of commissioners executed a lease to their co-appellees of one of the suites of rooms for a term of ten years, giving them the exclusive right to occupy said rooms and use them for their own private business purposes, and agreeing to furnish heat, light, and water in the rooms to lessees, and a janitor to take care of said rooms, and that lessees have entered into possession of said rooms under said lease; that there was no notice given by said board of its intention to lease said rooms.

Counties are involuntary political or civil divisions of the State created by general laws to aid in the administration of the State government. Their powers are

created and defined by statute. The powers of the board of commissioners are limited and for any act done by them not within the scope of their powers, the county is not liable. 1 Dillon Municipal Corp., section 25; *Potts v. Henderson*, 2 Ind. 327; *Campbell v. Brackenridge*, 8 Blackf. 471; *McCabe v. Board, etc.*, 46 Ind. 380; *Board, etc., v. Ross*, 46 Ind. 404; *Board, etc., v. Barnes*, 123 Ind. on pp. 406, 407, and cases cited; *Board, etc., v. Allman, Admr.*, 142 Ind. 573; *Trustees M. E. Church of Hoboken v. Mayor, etc.*, 33 N. J. L. 13 (19), 97 Am. Dec. 696, (700); *Stephens v. St. Mary's Training School*, 144 Ill. 336, on p. 344 (18 L. R. A. 832), and cases cited; 36 Am. Rep. 438, and note on p. 452.

Considered with respect to their corporate powers, counties rank low down in the scale of corporate existence, and are frequently termed *quasi* corporations. 1 Dillon Munic. Corp., section 25; Tiedeman Munic. Corp., section 3; Cooley Const. Lim. 294–301; *Hayward v. Davidson*, 41 Ind. on page 215; 4 Am. and Eng. Ency. of Law, pp. 345, 346, 368, note 1; 374 note 14, 1, 4; *Madway v. Commissioners*, 11 Ohio St. 183; *Cathcart v. Comstock*, 56 Wis. 590, on pp. 607–608; *Hawkins v. Board, etc.*, 50 Miss. 735; *Irwin v. Commrs. Northumberland Co.*, 1 S. and R. (Pa.) *505; *Lyon v. Adams*, 4 S. and R. (Pa.) 443; *Vankirk v. Clark*, 16 S. and R. (Pa.) 286; *Stevens v. St. Mary's Training School, supra*; *Louisville, etc., R. R. Co. v. County Court*, 1 Sneed 637, 62 Am. Dec. 424 on p. 449.

Counties are subdivisions of the State, organized solely for governmental purposes. 4 Am. and Eng. Ency. of Law 343; *Cones v. Board, etc.*, 137 Ind. 404, and cases cited; *Board, etc., v. Allman, Admr.*, and cases cited.

A county court house with the real estate upon which it stands is public property held by the county, but in

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trust for the public use. *Board, etc., v. O'Conner*, 86 Ind. 531; *Secrist v. Board, etc.*, 100 Ind. 59; *Trustees M. E. Church of Hoboken v. Mayor, etc., supra*; *Commonwealth v. Rush*, 14 Pa. St. 186; *Commonwealth v. Bowman*, 3 Pa. St. 202.

Section 5745, R. S. 1881, section 7830, R. S. 1894, provides that the county commissioners "shall have power at their meetings to make orders respecting the property of the county according to law; to sell the public grounds of the county upon which the public buildings are situate and to purchase in lieu thereof, in the name of the county, other grounds in the county seat on which such buildings shall be erected; to purchase other lands for the enlargement of the public square; and take care of and preserve such property."

The board of commissioners is authorized to purchase and own the real estate upon which the court house is erected, for that purpose, which is a public purpose, and has no power to use or lease the same or any part thereof to be used for any private purpose, unless there is a statute giving such power. The court house is erected for the public use, to furnish a place to hold the courts, and for offices for the clerk, sheriff, treasurer and auditor, and for such other public purposes as may be necessary.

The increase in the business of the court may from time to time require additional rooms in which to hold court, as well as for juries and grand juries, and for the county officers named, and the board of commissioners cannot, by contract, prevent themselves or their successors from using or setting apart for the court, or the county officers, or for other public purposes, rooms in the court house not before used for such public purpose.

The contract in controversy here, if valid, would prevent the board of commissioners for ten years,

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from May 1, 1894, from using the rooms mentioned in the lease, for any public purposes, no matter how urgent the necessity. During this time the board is required to furnish heat, light and water in the rooms to the lessees, and a janitor to take care of the rooms, or respond in damages for a failure so to do. Such a use of the property is a private and not a public use.

Sections 5745 (7830), *supra*, gives the board of commissioners the power to sell the ground upon which a court house is situate, and to purchase in lieu thereof, in the name of the county, other ground in the county seat on which such building shall be erected.

Under the law in this State, the board of commissioners may also, upon petition and proper procedure, order the re-location of the county seat; in such case the public grounds in the old county seat are conveyed away and are not owned by the county. The contract mentioned, if upheld, deprives the board of the right to exercise power or jurisdiction in these matters, without incurring a liability for damages for a breach of such contract. *Driftwood, etc., Turnp. Co. v. Board, etc.*, 72 Ind., on pp. 239, 240, 241, 242.

It may be correctly said that the board of commissioners cannot, by contract, preclude itself or its successors from the right and duty to exercise the powers given it by statute when in its judgment or discretion it is deemed necessary so to do. *Driftwood, etc., Turnp. Co. v. Board, etc., supra*; *Board, etc., v. Taylor*, 123 Ind. 148 (154.)

It is urged that municipal corporations have the power to lease rooms not needed for public use, and that this settles the question here. The courts in some States have held that where a municipal corporation has in good faith built and used a town hall for municipal purposes, it has the right to allow

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it to be used incidentally for other purposes, either gratuitously or for a compensation. *Worden v. New Bedford*, 131 Mass. 23, 41 Am. Rep. 185.

But this use was only temporary, did not interfere with the municipal use of the hall, and was incidental only.

In such States, however, it is held that when a city or town does not devote its city or town hall or other public building exclusively to municipal use, but lets it, or a part of it, for its own advantage and emolument by receiving rents or otherwise, it is liable while it is so let to any person, for an injury caused by any defect or want of repair in such hall or public building, in the same manner as a private owner would be. But there would be no such liability if such hall or public building were used solely for municipal purposes. *Worden v. New Bedford, supra.*

This is a clear recognition by the courts that when the city or town buildings are let to private parties such use is a private and not a public use.

Under the laws in this State, the land upon which the court house is erected is purchased and held only for such purpose, which is a public purpose, and under all the authorities can be used for no other purpose.

It is clear, therefore, that the cases concerning the power of a municipal corporation to rent its public buildings can have no application in this case. The difference is recognized in *Bolling v. Mayor of Petersburg*, 8 Leigh (Va.) 224.

In that case the doctrine was, under a statute authorizing it, carried much further, but it was also expressly held that if the conveyance had been made to the county whereon to erect a court house the rule would not apply.

The court said: "If the purchase in this case had

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been made by the corporation court of the town of Petersburg under the act of assembly empowering the county and corporation courts to purchase lands whereon to erect a court house and other buildings connected with the administration of justice, I should have been clearly of the opinion that the land could not be applied to purposes other than those indicated by the act of assembly. For as the courts have not general power, but a special power for particular purposes only, they must of necessity be confined in their use of the lands to the purposes for which authority was given to purchase." *Bolling v. Mayor of Petersburg, supra*, on p. 233.

If the board of commissioners had the power to rent two rooms in the court house for ten years, it has the power to rent the same, as well as other rooms, for a longer period. If such power exists, then the county, although organized solely for governmental purposes, may, by the exercise of such power by its commissioners, be made liable for injuries caused by the negligence of its officers in failing to keep such court house in repair. *Worden v. New Bedford, supra*. But this court held in *Board, etc., v. Daily*, 132 Ind. 73, that a county is not liable for injuries occasioned by the negligence and carelessness of the board of commissioners in the care and control of the court house. The court said: "It is now well settled that counties are involuntary corporations organized as political subdivisions of the State for governmental purposes and not liable any more than a State would be liable for the negligence of its agents or officers." If the county is not liable in such cases, it is evident that the board of commissioners has no power to make a contract or perform any act which will render the county liable for injury to persons caused by the

negligence of its officers in failing to keep the court house in proper repair.

We think it clear, both upon principle and authority, that the boards of commissioners in this State have no power to rent the court house, or any part of it, for private use, and that the relation of landlord and tenant cannot exist between the county and any private person as to the court house, or any part thereof, under the laws now in force.

There is no statute in this State authorizing the boards of commissioners to rent the court house, or any part thereof, for private use.

It follows that the court erred in overruling the demurrer to the information.

Judgment reversed, with instructions to overrule the demurrer to the information, and for further proceedings not inconsistent with this opinion.

Filed March 8, 1896.

No. 17,741.

DEWEESE ET AL. v. HUTTON ET AL.

APPELLATE PROCEDURE.—*Judgment.—Presumption.*—A judgment general in form will be presumed on appeal to have been rendered on an unobjectionable paragraph of a complaint containing two or more, if any of them was good.

SAME.—*Surplusage, Motion to Strike Out.*—The overruling of a motion to strike out parts of a pleading, consisting of mere surplusage, is not available error.

INJUNCTION.—*Repair of Bridge.—Illegal Contract.*—One who has contracted with the board of county commissioners for the repair of a specified bridge may be joined with such commissioners in an action to restrain the performance of the contract on the ground that it is illegal.

144	114
160	459

144	114
170	576
170	577

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SAME.—Illegal Contract.—Bond for Faithful Execution.—Repair of Bridge.—The giving of a bond for the faithful execution of a contract with the board of county commissioners for repairing a bridge will not prevent an action to restrain the performance of such contract on the ground that it was unlawful.

BRIDGES.—Repair.—Notice.—Bids.—Statute Construed.—The provisions of sections 3278–3280, R. S. 1894, requiring notice and competitive bidding where the construction or repair of a bridge is entrusted to a superintendent, and authorizing but not requiring such an appointment to be made, does not apply where no superintendent is appointed.

SAME.—Contract for Repairs.—Ultra Vires.—A contract by the board of commissioners of a given county for repairs upon a bridge, for which no estimate has been made or directed, is *ultra vires* and void under sections 3275–3277, R. S. 1894, making bridge repairs primarily a charge on the road district in which the bridge is situated, and authorizing such board to appropriate such public money for the repairs only where the “estimate” therefor exceeds the ability of the road district to perform by applying its ordinary road work and tax.

HARMLESS ERROR.—Denying Motion to Dissolve Restraining Order.—Error, if any, in denying a motion to dissolve a restraining order, is harmless where the injunction is made perpetual on a general hearing.

From the Fulton Circuit Court.

M. A. Baker, M. L. Essicks, for board of commissioners, and *Conner, Rawley & McMahan* and *J. H. Bibler*, for appellant Godman.

Holman & Stephenson and *E. Myers*, for appellees.

HACKNEY, C. J.—The appellants, Deweese, Dudgeon and Lovatt, as the board of commissioners of Fulton county, and Godman, a contractor with said board for the repairs of a certain bridge in said county, were sued by the appellees, tax payers of said county, to restrain the performance of a contract.

There were two paragraphs of complaint which are here questioned for the first time. It is only where the complaint, as an entirety is bad, that its sufficiency

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can be questioned for the first time in this court. *Ashton v. Shepherd*, 120 Ind. 69; *Branch v. Faust*, 115 Ind. 464; *Ludlow, Guard., v. Ludlow*, 109 Ind. 199; *Hutchings v. Hay*, 132 Ind. 369.

The second paragraph, in our opinion, was sufficient. It alleged the execution of a contract between Godman and the members of the board for repairs upon a bridge, in which contract the board obligated the county to pay Godman the cost thereof, to-wit: \$5,500; that no action was taken by the board to determine that public convenience required the proposed repairs; that no survey or estimate for said repairs was ever made or directed; that the contract was let to Godman without competition and at an excess over the real cost of the repairs of \$4,000, and there were other allegations as to the failure to appoint a superintendent, give notice for bids, etc. Primarily bridge repairs are to be made by the road district in which the bridge is situated, and the authority of the board of county commissioners to appropriate public moneys for such repairs is limited to those cases where the estimate for such repairs "shall exceed the ability of the road district * * by the application of its ordinary road work and tax." R. S. 1894, sections 3275, 3276, 3277, 3282 (R. S. 1881, sections 2885, 2886, 2887, 2892); *Board, etc., v. Allman, Admr.*, 142 Ind. 573; *Driftwood, etc., Co. v. Board, etc.*, 72 Ind. 226.

In section 3275, *supra*, it is provided that "Whenever, in the opinion of the county commissioners, the public convenience shall require that a bridge should be repaired or built over any watercourse, they shall cause survey and estimate therefor to be made, and direct the same to be erected." By section 3276, *supra*, it is provided further that "If the estimate therefor shall exceed the ability of the road district

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in which such bridge is to be built, by the application of its ordinary road work and tax to perform, the county commissioners may make an appropriation from the county treasury to build or repair the same." In *Driftwood, etc., Co. v. Board, etc., supra*, it was said of these sections: "By the first section of the act above set out, when a bridge is to be repaired or built, the commissioners are to 'cause surveys and estimates therefor to be made, and direct the same to be erected.' Why were surveys and estimates to be made? The second section answers this question. It is because the appropriation from the treasury depends upon the question whether the estimate exceeds the ability of the road district, by the application to the work of the ordinary road work and the tax of the district. It was not contemplated that the expense should be borne by the county treasury, except the excess beyond the ability of the road district." In the *Board, etc., v. Allman, Admr., supra*, it was said of the sections of the statute above cited: "It certainly cannot be claimed that, under these sections, the board of commissioners have general power to make appropriations of public funds for the repair of bridges. Such appropriations can only be made in certain cases, and upon certain contingencies." One of such contingencies the court gave as follows: "The board can in no case pay for repairs out of the county treasury, unless the road district first applies its ordinary road work and tax in making the repairs. Then the board may, if it deem the bridge of sufficient importance, pay the residue out of the county treasury." It appears, therefore, from the allegations of the complaint that the appellants were not in the exercise of this special and limited power, but were acting upon the assumption of a general power to appropriate for the repair of bridges. The error of the board was not

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a mere irregularity, but was the assumption of a power not possessed, and its act was void.

In argument, counsel place much stress upon the fact that no notice for the receipt of bids was given and competition permitted. It is to be regretted that a board would award a contract for a work so extensive and valuable without estimates and competition, and it is to be regretted that no statute requires such competition. The importance of the requirement will not, however, warrant the holding that sections 3278, 3279 and 3280, R. S. 1881, supply the requirement. Those sections permit the appointment of a superintendent of construction and, where the work is entrusted to him, notice and competitive bidding are required. They have no application where a superintendent is not appointed, and probably none where repairs only are to be made. Nor is an appointment imperative. *State, ex rel., v. Board, etc.*, 125 Ind. 247.

It is suggested by the appellant, Godman, that the cause of action pleaded is not good as against him, even if good as to the board. He and the commissioners have, by the contract, assumed mutual obligations, and it is by the joint acts of the board and said Godman that the appropriation is to be made from the treasury. We observe no good reason for assuming that all parties to the contract may not be enjoined in one suit.

It is never available error to overrule a motion to strike out parts of a pleading consisting of a mere surplusage. *Owen v. Phillips*, 73 Ind. 284; *Lewis v. Godman*, 129 Ind. 359.

It was harmless, therefore, to overrule the motion of appellants to strike out a copy of the contract in question, which was filed as an exhibit with the complaint.

It is certainly an error to suppose, as counsel seem

to assert, that the bond of Godman for the faithful execution of the contract supplies to the appellees such a remedy at law as would preclude the enforcement of equitable remedies against the execution of the contract. The measure of liability upon the bond does not secure the tax payer against an unauthorized expenditure of public moneys. It secures the terms of the contract on behalf of Godman, nothing more.

The separate answer of Godman set up the contract between himself and the board and alleged the execution of a bond, with approved sureties, for faithful performance of the contract.

To this answer the court below sustained the demurrer of the appellees. This ruling presents practically the same question arising upon the complaint, namely, the power of the board to execute it, and what we have said of the complaint applies against the answer.

The appellants complain of the action of the trial court in denying their motion to dissolve the restraining order and in refusing to entertain certain affidavits in support of the motion. None of the affidavits went to the power of the board to execute the contract, and could not have done so without disclosing action by the board in the way of causing survey and estimate and contracting for an expenditure in addition to the road work and tax of the district. Besides, there was a general hearing upon the issue tendered by the complaint, and the injunction was made perpetual. If that action was correct the appellants could not have been harmed by the intermediate error, if there was such error.

Upon the question of the sufficiency of the complaint and of the answer, counsel for the appellants insist that a collateral attack upon the action of the board was not allowable, since, as claimed, the board

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had jurisdiction of the general subject; that it exercised a discretion entrusted to it by the statute, and that though an error in judgment may have resulted in an unwise or improvident contract, the courts may not interfere with that action. There is no question of the rule to which counsel refer, but our only doubt is as to its application in the present case.

In the matter of the agreed price for the repairs, unless it appeared that the parties acted fraudulently, there could probably be no relief in collateral proceedings, since that would involve a question of judgment certainly entrusted to the board, in such cases as the board might act. So with reference to the condition of the bridge and the necessity for repairs. But, as we have seen, the first question that confronts us is as to whether a contingency existed in which the board possessed the power to act, in the exercise of its judgment and discretion. By the cases of *Driftwood, etc., Co. v. Board, etc., supra*, and *Board, etc., v. Allman, supra*, it was held that there was no power to act, excepting to supplement the ordinary road work and tax of the road district in making such repairs.

It is a familiar rule and the undoubted policy of the law to require of such corporations a strict observance of their powers. It would be a very liberal construction of these statutes which would sanction a contract, and an appropriation of public moneys thereunder, upon the theory that general power existed to assume, primarily, the obligation to repair bridges when the statutes have conferred special power to be exercised upon a particular contingency. Where power is not given expressly or by fair implication from some express grant, it does not exist, and its exercise is *ultra vires*. 15 Am. and Eng. Ency. of Law, p. 1039; *Kyle v. Malin*, 8 Ind. 34; *City of Indian-*

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apolis v. Indianapolis, etc., Co., 66 Ind. 396; *Smith v. City of Madison*, 7 Ind. 86; *City of Lafayette v. Cox*, 5 Ind. 38.

There being no available error in the record, the judgment of the circuit court is affirmed.

Filed March 8, 1896.

No. 17,476.

DALTON v. THE CLEVELAND, CINCINNATI, CHICAGO AND
ST. LOUIS RAILWAY CO.

144	121
148	417

INJUNCTION.—Nuisance.—Erection of Building.—The erection of a building which will not of itself constitute a nuisance, will not be enjoined because the use to which it is designed to be put would constitute such a nuisance.

From the Vigo Circuit Court.

L. S. Dalton and *S. C. Davis*, for appellant.

B. K. Elliott and *W. F. Elliott*, for appellee.

HACKNEY, C. J.—The lower court denied the appellant's petition for an injunction, and that ruling is here presented as error arising upon the evidence. By the petition it was alleged that the appellant owned a lot in the village of Fontanet, on the line of appellee's railway and adjacent to its right-of-way, upon which lot appellant maintained a building for the combined purposes of a business house, a dwelling and a meeting place for social and benevolent societies; that the appellee was proceeding in the erection of a structure, opposite and very near to the appellant's building, to be used as a coal chute for coal-

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ing its locomotives; that from the height and character of the structure it would greatly impair the access, the view, the light and the air to her building; that its use for the purposes aforesaid would cause unusual, loud, and offensive noises constantly, by day and by night, disturbing the sleep and impairing the use of the appellant's building for business, social, and residence purposes; that the use of said coal chute would produce great quantities of dust which would be blown into appellant's building, injuring the furniture, the stock in trade and the comfortable enjoyment of living within it; that the storage and handling of the coal would bring to appellant's premises and within her building the fumes of sulphur and the odors of other gases injurious to health and destructive of business in her building; that the escaping of steam, soot and smoke from the locomotives, frequently taking coal at said chute would not only disturb the occupants of her building by the noise, but would enter the building, to the annoyance and discomfort of the occupants; that said locomotives would drop fire about said chute, exposing it to destruction, greatly increasing the hazards from fire to her buildings. From these alleged causes general and special damages are alleged, and it is prayed that the further construction of said coaling station be enjoined.

There is no evidence that the structure will materially obstruct or impair the enjoyment of the appellant's property with respect to any of the easements in light, air or access. It is wholly within the appellee's right-of-way, does not reach the highway upon which the appellant's lot fronts, and the building proper is not directly opposite to appellant's building, though a trestle, upon which cars are to be stored for unloading, does extend to a point near to

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said highway and directly south of the appellant's building. There being no such evidence, the appellee insists that though there may be conflict in the evidence upon the alleged injurious uses of the structure, this court should not pass upon such conflict, and that conceding such future uses to be injurious to the appellant and her property, a court of equity may not enjoin the erection of the structure, and that, at most, such uses only would be enjoined. Since it is the erection of the structure that is sought to be enjoined and not the uses of the structure, the appellee's proposition suggests a very important inquiry. The appellant's only answer to this proposition is that to permit, without question, the erection of the structure and the investment therein of a large sum of money, would be asserted by the appellee as an effective estoppel to thereafter question the uses for which the structure was designed. It is not necessary that we should decide to what extent the appellee might, by estoppel, acquire the vested right to conduct and continue a nuisance, for it seems to us plain that the appellant, to avoid an estoppel, was not required to institute this suit, but could have given such notice of opposition to the structure and protest against such future uses as to have been free from the charge of laches. No issue was made upon the pleadings or the evidence as to the uses to which said structure might be employed, other than for coaling purposes, and we have no means of knowing that the company could not use it for other and legitimate purposes. We do not decide, however, that an injunction should be granted to prevent the erection of a building, not of itself a nuisance, though the owner could make no other use of the building than that which would constitute a nuisance. On the contrary, we are impressed

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that a structure not in itself a nuisance, may be erected without interference from the courts, if the owner will invest with the chance of a denial of his right to conduct within it a particular business or use which may be declared a nuisance, or the further chance that he may not find a use for it which will not prove a nuisance.

The courts have no privilege to deny one the right to expend his money unwisely or to erect such buildings upon his lands as do not materially interfere with the reasonable enjoyment by others of their property. That appellant might have sought, in this suit, to restrain unlawful uses of the structure is not questioned, but that she did not do so is free from the slightest doubt. In Wood. Nuisances, section 997, it is said: "But if the bill seeks to enjoin the erection of a building upon the ground that its use will be a nuisance, it must be alleged in the bill and proved upon the trial that the building itself will be a nuisance, and that it can be devoted to no use except such as will be productive of such results." This proposition is supported by the case of *Cleveland v. Citizens, etc., Co.*, 20 N. J. Eq. 201. The case in hand does not meet the requirements of this proposition, though, as we have said, this proposition is as liberal as the appellant could require. In addition to the authority cited, see *Keiser v. Lovett*, 85 Ind. 240; *Bowen v. Mauzy*, 117 Ind. 258; *Robinson v. City of Valparaiso*, 136 Ind. 616. Each of these cases recognizes the rule that equity will not restrain that which is not a nuisance upon the claim that it may be so used as to constitute a nuisance. In this view of the case it is unnecessary to pass upon the sufficiency of the evidence to estab-

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lish the allegations that from soot, steam, dust, gases and noise the coaling of locomotives will become a nuisance.

There being no available error in the record, the judgment of the circuit court is affirmed.

Filed March 4, 1896.

No. 17,590.

SCOTT v. CLEVELAND, CINCINNATI, CHICAGO AND ST.
LOUIS RAILWAY CO.

144	125
169	643

PLEADING.—Complaint.—Theory.—The want of a theory does not make a complaint demurrable if it states sufficient facts to constitute a cause of action.

SAME.—Complaint.—Railroad.—Damages to Passenger.—Averments that a conductor negligently and carelessly mistreated a passenger in carrying her beyond her destination and in stopping at a distance from the depot and roughly ordering and forcing her to get off, are not sufficient to constitute a cause of action, where it is not alleged that she had conformed to the rules of the company and had paid her fare, or offered to do so.

SAME.—Complaint.—Railroad.—Damages to Passenger.—Averments that a carrier's servants carelessly and negligently cause a passenger to enter a train for which she had a ticket given her by mistake, without averment of their knowledge that she did not desire to take passage on the train indicated by the ticket she held, do not constitute a cause of action against the carrier.

RAILROAD.—Passenger.—Ticket Agent.—Breach of Duty.—Union Depot.—A railroad company whose ticket is given by mistake to a passenger in lieu of a ticket of another company which was called for, where it was bought in a union depot, of an agent who had authority to sell tickets for both companies, is not liable for the agent's mistake, since the breach of duty is that of the company whose ticket was desired.

From the Putnam Circuit Court.

Scott v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co.

J. R. East, R. G. Miller, C. C. Matson and S. E. Matson, for appellant.

B. K. Elliott and W. F. Elliott, for appellee.

MCCABE, J.—The appellant sued the appellee for damages suffered by her on account of the alleged negligence of the defendant.

The circuit court sustained a several demurrer to both paragraphs of the complaint, for want of sufficient facts. The appellant refusing to amend or plead further, the appellee had judgment, upon demurrer, that plaintiff take nothing by her suit.

The error assigned is upon the ruling upon the demurrer.

The substance of the first paragraph of the complaint is as follows: That on June 20, 1893, appellant resided at Bloomington, Indiana, on the Louisville, New Albany & Chicago Railway, about forty miles south of Greencastle Junction on said road where the Terre Haute & Indianapolis Railroad, commonly known as the Vandalia, crosses the former; that about one mile and a half east of said junction was what was known as the Greencastle South Depot, at both of which points all passenger trains on said Vandalia stop and let off and take on passengers; that appellant had frequently traveled from said Bloomington to Indianapolis, Indiana, by the way of said Vandalia railroad, and knew that all passenger trains on said road stopped at each of said points; that on said day, at about 11 o'clock p. m., appellant being at the Union Depot in Indianapolis and wholly unacquainted with appellee's road or the stops made thereon, and desiring to return to Bloomington by way of said Vandalia, and by way of said Greencastle Junction, she applied to an agent in said

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depot for a ticket over the Vandalia to Bloomington, which agent was duly authorized to sell tickets for all roads leading out of Indianapolis from said station, among which were the appellee's and the said Vandalia, though she had no knowledge of his authority to sell tickets for the appellee; that said agent negligently and carelessly gave her a ticket for \$1.85 over and by way of appellee's road, which did not pass by said Greencastle Junction, but did pass at what is known as the North Depot at Greencastle, Indiana, but made no stop east thereof after leaving Indianapolis; that the amount paid was the usual fare rates from Indianapolis to Greencastle over both roads; that after she had so purchased said ticket the appellee's agents and servants further carelessly and negligently caused her to enter one of the defendant's passenger trains then about to move west, and relying on the directions so given, and relying on the further fact that the agent so selling said ticket had given her a ticket over the said Vandalia, and believing she was then entering the train of the latter company, she entered said car and not otherwise; that said train immediately departed, and in about an hour thereafter defendant's servants announced the station of Greencastle, and believing she was on said Vandalia railroad, and knowing if she was she could not change to the Louisville, etc., railway until she reached said Greencastle Junction, a mile and a half west thereof, and appellee's servants further negligently failing to notify her that she had reached the crossing of said Louisville, etc., railway, she remained on said train, when she was taken to the city of Terre Haute, Indiana, and put off said train in the night, in the mud and cinders, more than a half mile away from any depot without any one to protect, guide or direct her to a depot or hotel, and where, by

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reason of such negligence she was compelled to remain for the space of twelve hours, during which time she was greatly frightened, annoyed and humiliated, took cold and suffered six months and was compelled to expend \$20 for medical attendance; that at the time she purchased said ticket she was sixty-five years old, crippled in her limbs, enfeebled in eyesight and was unable to read the ticket handed her by said agent, and had no knowledge that said ticket was for passage over defendant's said railroad, and without fault in the purchase of said ticket; that she received her injuries aforesaid solely on account of the carelessness and negligence of the defendant and without any fault on her part, to her damage \$5,000.00, for which she demands judgment.

The second paragraph differs in no material respect from the first, except that in the second it is alleged in addition to the facts averred in the first that she made inquiries while at said Greencastle as to what the distance was to the junction, but could obtain no information thereon, and that the conductor, with full knowledge of the facts herein set forth, negligently and carelessly mistreated her in this, to-wit: That he carried her to Terre Haute, Indiana, stopped his train a half mile from the depot and there angrily and roughly ordered plaintiff from said train, and hurriedly removed her therefrom at 2 o'clock in the morning, forced her to get off, etc.

It has been the subject of much discussion as to what the true theory of the complaint is, and it has even been charged that it is bad because it has no theory. But the statute does not make the want of a theory in a complaint a ground of demurrer, but a want of sufficient facts is the only defect in that direction which the statute makes a ground of demurrer. If facts sufficient to constitute a cause of action are

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stated in the complaint, it is difficult to see how a demurrer assigning want of sufficient facts could be sustained, because the theory of the complaint was not apparent, or because it is difficult to tell which of two theories is the true one where the complaint is so framed as to make either theory consistent therewith.

Such a defect would be uncertainty, the remedy for which is a motion to make more certain and not a demurrer.

But we find no great difficulty here in ascertaining the true theory of the complaint. The gist of the action is the alleged negligence in delivering to appellant the wrong ticket. Her allegations of her defective eyesight and her freedom from contributory negligence are sufficient to excuse her for failure to read her ticket, if indeed it would be negligence in any case for a passenger to fail to read his ticket. But the appellant is slow to say whether the complaint rests on the theory of the wrong in carrying her beyond her destination and rudely expelling her in the night at an unsuitable place, or for the wrong in delivering to her the wrong ticket.

But let us inquire whether either paragraph is good on the latter theory, or whether either states facts sufficient to make the appellee liable for her carriage beyond Greencastle and her final expulsion. If such carriage and expulsion form the gist of the action, then appellee's liability therefor cannot be aided or supplemented by the delivery of the wrong ticket. If such carriage and expulsion form the ground of the action, it was for the trespass and not for negligence, which is the theory outlined in the complaint.

At all events, she became a passenger on appellee's train, though she got there through a mistake of somebody. When she delivered her ticket to the con-

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ductor she had paid her fare to Greencastle and no further. By mistake she remained on the train, and on the way from Greencastle to Terre Haute she learned of the mistake. She was still a passenger and entitled to be treated as such, though she was on the train beyond Greencastle by mistake. *Cincinnati, etc., R. R. Co. v. Carper*, 112 Ind. 26; *Columbus, etc., Ry. Co. v. Powell*, 40 Ind. 37.

But while the appellee owed her the duty of treating her as a passenger so as to entitle her to protection against the negligence of the company, she also owed the duty to the company of treating it as a common carrier.

If there was no other relation created by the circumstances, as we shall see when coming to consider the sale of the ticket, than that of passenger and carrier, then the appellee, as a carrier, was entitled to compensation for carrying appellant beyond Greencastle, the failure to pay which on demand would justify the company in putting her off the train at any reasonable place. *Chicago, etc., R. R. Co. v. Bills*, 104 Ind. 13; *White v. Evansville, etc., R. R. Co.*, 133 Ind. 480, and authorities cited; *Sage v. Evansville, etc., R. R. Co.*, 134 Ind. 100.

A passenger who fails and refuses to pay his fare has no right to demand to be carried to a station before the company may rightfully put him off or eject him from the train. *White v. Evansville, etc., R. R. Co.*, *supra*.

The averment that the conductor negligently and carelessly mistreated appellant in carrying her to Terre Haute, and stopped a half mile from the depot, and roughly ordered her from said train, and hurriedly removed her therefrom, and forced her to get off, etc., does not put the conductor in the wrong, unless his

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company was liable for the delivery of the wrong ticket. Because it is nowhere alleged that she had conformed to the rules of the company, or that she had paid her fare, or offered to do so, without which the conductor had the right to put her off. *Chicago, etc., R. R. Co. v. Bills, supra; White v. Evansville, etc., R. R. Co., supra.*

That she was forced to get off may have been rendered necessary by her refusal to pay fare or get off voluntarily on request, or otherwise failing to comply with the regulations of the appellee. If so, the conductor was justified. The presumption is against misconduct, and that presumption prevails in favor of the conductor until it is overcome by such allegations as put him in the wrong. *Chicago, etc., R. R. Co. v. Bills, supra; White v. Evansville, etc., R. R. Co.*

So that it appears that the true theory of both paragraphs of the complaint is that the gist of the action is the negligence in delivering the wrong ticket.

Nor is this conclusion obviated by the averments "that after she purchased said ticket and the same was delivered to her, the defendant's * * servants * * carelessly and negligently ordered, directed and caused * * plaintiff * * to enter one of defendant's passenger trains," because there is no averment that such servants had any knowledge that she did not desire to take passage on the train indicated by the ticket she held. So these averments, like those as to her carriage beyond Greencastle and expulsion, have no force in showing a liability on the part of appellee, unless they derive such force from the allegations of negligence in the delivery of the wrong ticket.

And even then they will derive no force from those allegations as against appellee, unless such allegations connect the appellee with the alleged negligence in the sale of the ticket.

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Such connection must depend upon the question whether the appellee in such sale owed the appellant any duty, and whether the facts alleged show that the appellee was guilty of a breach of that duty.

That there is negligence shown by both paragraphs in the delivery of the wrong ticket, may be conceded, and that the appellant is shown therein to be free from contributory negligence in relation thereto, may also be conceded. But the question remains, whose negligence was it? It is settled law, as was said in *Faris v. Hoberg*, 134 Ind., at page 274, that: "In every case involving actionable negligence, there are necessarily three elements essential to its existence: 1. The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; 2. A failure by the defendant to perform that duty; and 3. An injury to the plaintiff from such failure of the defendant."

Both paragraphs show that appellant applied to the ticket agent to purchase a ticket over the Vandalia to Greencastle. They both show that he was duly authorized by the Vandalia as its agent to sell such tickets. Therefore, on such application and request, and on payment of the regular ticket fare as shown in both paragraphs, a duty arose on the part of the agent of the Vandalia and the Vandalia itself to deliver to appellant a ticket over its road to Greencastle. It failed to do so, and therefore was guilty of a breach of the only duty that was created by the circumstances. It was as the agent of the Vandalia that he was applied to for a ticket over that road, it was as the agent of the Vandalia that he negligently failed to deliver such ticket, and therefore the breach of duty shown was a breach of the duty that the Vandalia owed to the appellant. The application and request, accompanied by payment, for a ticket over the

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Vandalia created or laid no duty on the appellee of any kind whatsoever; and therefore, if the agent, in issuing the ticket over appellee's road was acting within the scope of his authority as the agent of appellee, which may admit of doubt under the circumstances, yet it was no breach of duty owed by appellee to appellant, because appellee owed her no duty, and had no power to perform the duty, for the breach of which she complains, namely the failure to issue to her a ticket over the Vandalia. See *Atchison, etc., Co. v. Cochran*, 41 Am. and Eng. R. R. Cases, 48 (7 L. R. A. 414); *Isaacson v. New York, etc., R. R. Co.*, 16 Am. and Eng. R. R. Cases, 188.

It follows from what we have said, that the facts alleged concerning the sale of the ticket have no influence on the facts occurring afterwards, and that all of the facts stated as occurring thereafter create no other relation between the parties to this action, and impose no other duties than those reciprocal obligations ordinarily existing between carrier and passenger.

For the reason given, both paragraphs of the complaint are bad, and the circuit court correctly sustained the demurrer thereto.

Judgment affirmed.

Filed March 4, 1896.

No. 17,718.

YOUNT v. YOUNT.

CONTRACT.— *Capacity to Contract.* — *Mental Weakness.* — Mental weakness, which is not alone sufficient to destroy capacity to contract, will invalidate a conveyance, if accompanied by undue influ-

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ence, duress, inadequacy of consideration, misrepresentations, concealment, taking advantage of ignorance, inexperience, or want of advice.

EVIDENCE.—*Burden of Proof.*—*Contract.*—Very slight circumstances will cast the burden of sustaining a contract upon the party asserting its validity, where the other party was old, feeble, illiterate, and weak-minded from sickness or other cause.

APPELLATE PROCEDURE.—*Sufficiency of Evidence.*—The Supreme Court will not disturb a finding by the court below on the weight of the evidence, where there is evidence sustaining it.

PLEADING.—*Complaint to Set Aside a Deed and Assignment.*—*Undue Influence.*—*Restoration of Consideration.*—A complaint in an action to set aside a deed and an assignment, upon the ground of undue influence and mental weakness, need not allege a restoration, or offer to restore the consideration, where the only consideration was a promise to support plaintiff for life contained in the deed, as a judgment setting aside the deed would also set aside the promise; and, besides, a provision in a deed for the support of the grantor during life cannot be specifically enforced.

From the Kosciusko Circuit Court.

A. G. Wood and F. E. Bower, for appellant.

L. W. Royce and L. H. Haymond, for appellee.

MONKS, J.—Appellee alleged in her complaint “that appellant was her son, and that on October 19, 1893, and for some time prior thereto, she was the owner in fee simple of the undivided one-third of certain real estate, which she inherited from her husband, William Yount, deceased, who was the father of appellant; that her said husband had died intestate, and his estate had never been administered upon or settled; that in addition to said real estate so inherited by her, she was entitled under the law to the sum of \$500 as such widow; that after the death of her husband, appellant purchased the interest in said real estate inherited by the other children of said deceased, and thereby became the owner of the undivided two-thirds of said real estate, and was the

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owner thereof prior to and on October 19, 1893; that one Eli Gitty, a son of appellee by a former marriage, was indebted to her said husband at the time of his death in a considerable sum, evidenced by several promissory notes which were on said day unpaid; that said promissory notes were in the possession of appellant, who claimed to be the owner thereof by assignments executed to him by the other children of the deceased; that on said day, and for several years prior thereto, appellant was and had been a full grown man, possessed of intelligence, of sound judgment, of large experience in the transaction of business, a clear comprehension of the values of all kinds of property and of the various methods of transferring titles thereto, and of resolute will and force of character; that on said day, and several years prior thereto, appellee, by reason of sickness, ill health and advanced years, was weak and feeble in body and in mind; she was illiterate and could neither write nor read writing, and was wholly inexperienced in the transaction of business, and totally unacquainted with the methods thereof; that she had but a meager knowledge of the values of property and was totally ignorant of the means by which the title to property was transferred and conveyed, and did not know a deed, even when read to her, from any other instrument in writing; that prior to said day appellant looked after the sale of her crops and the expenditure of the money derived therefrom, and assumed the transaction of her business for her, and that by means thereof he had sought and obtained her trust and confidence to such a degree that he could overpower and control her will in the then feeble condition of her mind and body, which rendered her easily susceptible to the influences, arts and persuasions of appellant; that on said day, and on divers other days prior

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thereto, appellant, well knowing appellee's weak and feeble, illiterate, and dependent condition, and well knowing his power and influence over her, and corruptly contriving to profit thereby, and to cheat and defraud appellee out of her said property, made frequent visits to her, and by means of persistent, continuous and undue persuasions and importunities, and by his overpowering influence, sought to induce her to convey to him her said lands, and transfer to him her interest in the estate of her deceased husband; that as a further means of effecting his said purpose, appellant made threats to her that he would have an administrator appointed for the estate of said deceased, who would take charge of all the assets of said estate, and that in such event she would be compelled to account for all such assets as she had used and were then in her hands, and that she would thereby be put to great vexation and trouble; that through said administrator he would press the collection of the said indebtedness of said Gitty to said estate, and that said Gitty, if pressed for the collection of said indebtedness would be broken up and financially ruined; that he, said appellant, would then bring suit for partition for said real estate and thus put her to great expense, trouble and annoyance, and deprive her of her home on said premises where she had lived for a long number of years, and to which she had become greatly attached; that said threats greatly excited and agitated appellee, and caused her to be seriously concerned about her welfare and that of her son, Ely Gitty; that while she was so excited and troubled, she was two days prior to said 19th of October, 1893, seized with an attack of heart disease to which she was subject, through which she was greatly prostrated in body and bewildered in mind to such a degree as to be incapable of understanding

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the ordinary affairs of life; that while in said condition, bodily and mentally, to-wit: on the 19th day of October, 1893, the appellant came to her, well knowing her condition, and told her that she must on said day enter into a contract with him for the conveyance to him in the future of her said lands or he would cause her and her son Eli all the trouble he had so threatened to do; he told her that he had prepared an instrument in writing for her to execute and which she must execute at once if she wished to prevent said threatened trouble to herself and her son, Eli; he falsely represented to her that the instrument she was to sign was only a contract providing for the future conveyance of her said land, and not a deed of conveyance thereof, which said peremptory demands and the threatened consequences which were to fall upon her and her said son, Eli, in case she refused compliance therewith, wholly broke down and overcome appellee's will, and being so wrought upon by appellant's overpowering influence and his said threats and his said false representations, that said instrument was not a deed, appellant thereby procured her to execute to him a quit-claim deed conveying to him in fee simple her said land, and also an assignment to him of all her interest in the estate of her deceased husband, without any consideration whatever, except a provision in said deed that the appellant was to support and maintain her during her life; that as a further inducement and consideration by which to obtain her signature to said instrument, which she so believed to be a contract, appellant promised and agreed with her that he would deliver up and cancel the said notes of Eli Gitty; that since the execution of said instrument appellant has refused to deliver up and cancel said notes, though often requested so to do; that appellee relied upon said representations that said in-

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strument was only a contract as aforesaid, and so relying executed the same without any knowledge that it was a deed; that the execution of said instrument was not the free, voluntary and intelligent act of appellee, but the execution thereof was procured by said overpowering and undue influence of appellant, and by his false threats and false representations, that said instrument was a contract and not a deed of conveyance; that on the first day of January, 1894, appellee so far recovered from said attack of heart disease as to understand the nature of said transaction, and for the first time learned the nature of said fraud that had been practiced upon her by appellant and that said instrument was a deed of conveyance of her land to appellant and also an assignment to him of her interest in said estate; that she thereupon demanded a rescission," etc.

Appellant filed a demurrer to the complaint for want of facts, which was overruled. An answer of general denial was filed, trial by the court was had, which resulted in a finding for appellee, and over a motion for a new trial, judgment was rendered against appellant.

The only errors assigned call in question the action of the court in overruling the demurrer to the complaint and in overruling the motion for a new trial.

Appellant insists "that weakness or feebleness of mind itself is not sufficient to avoid a deed; that the alleged misrepresentations were not such as she had the right to rely upon; that the threats complained of do not amount to duress, and that there is no allegation of an offer by appellee to restore the consideration received by him before the commencement of the action; and that for these reasons the complaint was insufficient and the demurrer should have been sustained." It is true that weakness of mind alone

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does not render one incapable of making a contract. Weakness or feebleness of mind may, however, become of controlling influence when connected with other facts tending to establish fraud. While mental weakness alone may not be sufficient to destroy capacity to contract, yet if it is accompanied by undue influence, duress, inadequacy of consideration, misrepresentations, concealment, taking advantage of ignorance, inexperience and want of advice, and the like, a conveyance procured by such means will be set aside.

When a person is weak and enfeebled in mind by reason of age, or from any other cause, and another takes advantage of such weakness and by any threats, artifice, or cunning, or undue influence he may possess, or by improper practices, induces such person to execute a contract, which in the free use of his deliberate judgment he would not have entered into, such contract should be set aside for fraud.

It was not necessary to allege in the complaint that appellee was at the time of unsound mind or in such a state of mental imbecility as to render her entirely incapable of making a deed. It is sufficient to allege facts which show that from her sickness and infirmities she was at the time in a condition of mental weakness, and that there was either gross inadequacy of consideration for the conveyance, or that by improper practices, undue influence, misrepresentation, or concealment, or taking advantage of her ignorance, she was induced to execute a deed which in the free exercise of her deliberate judgment she would not have done.

Undue influence generally occurs when one of the parties is weak in intellect or is so situated or related to the other party as to be under his influence. What the relation may be is not material if confidence is

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reposed and influence obtained. When one of the parties is old and feeble, illiterate, and weak-minded from sickness, or other cause, very slight circumstances will cast the burden on the other party. *Wray v. Wray*, 32 Ind. 126; *Ikerd v. Beavers*, 106 Ind. 483 (488-490), and cases cited; *McCormick v. Malin*, 5 Blackf. 509; *Ashmead v. Reynolds*, 134 Ind. 139, and cases cited; 39 Am. St. Rep. 238, and note on page 244; *Stumph v. Miller*, 142 Ind. 442; *Harding v. Handy*, 11 Wheaton 103; *Harding v. Hardy*, 2 Mason 378; *Parker v. Parker*, 45 N. J. Eq. 224; *Giles v. Hodge*, 74 Wis. 360; *Hemphill v. Holford*, 88 Mich. 293; *Cowee v. Cornell*, 75 N. Y. 91, 99, 31 Am. Rep. 428; *Greene v. Roworth*, (113 N. Y. Ct. of App. 462) 21 N. E. Rep. 165; *Barnard v. Gantz*, 140 N. Y. 249, 35 N. E. Rep. 430; 1 Story Eq. Jur., section 239; 2 White & Tudor's Lead. Cases in Eq., 1206-1210, 1230-1250; 2 Pomeroy Eq., section 947; 27 Am. and Eng. Ency of Law, 453-459, 461-489.

The complaint alleges that appellant procured the execution of the deed and assignment to him of her interest in the estate of her deceased husband, which included the amount of \$500 due her as widow, to be paid in cash out of the assets of said estate, without any consideration whatever except a provision in said deed that the appellant was to support and maintain her during her life. We do not think, under these allegations, that the appellee was required to allege that she restored or offered to restore any consideration for the reason that the complaint alleges that she received none except the promise to support her, which was contained in the deed, and any judgment setting aside the deed would also set aside the contract of support contained therein. Besides, specific perform-

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ance of a provision in the deed that appellant was to support and maintain appellee during her life could not have been enforced by appellee against appellant. *Ikerd v. Beavers, supra; Louisville, etc., Co. v. Bodenschatz, etc., Stone Co.,* 141 Ind. 251.

The questions presented in this case were fully considered by this court in *Ashmead v. Reynolds, supra*, and we think the law, as declared in that case and in the cases cited therein, sustain the action of the trial court in overruling the demurrer to the amended complaint.

It is urged by appellant that the finding of the court was not sustained by sufficient evidence. The rule is firmly settled that if there is evidence sustaining the finding, this court will not reverse the case on the weight of the evidence. We think there is evidence which supports the finding, and, under the rule stated, we cannot weigh the evidence.

This cause was first tried by the court, and a finding and judgment rendered in favor of appellee. Appellant filed a motion for a new trial as a matter of right, which was sustained and a new trial granted. The case was again heard by the court, a special judge having been appointed and a finding and judgment again rendered in favor of the appellee. From this second judgment this appeal is taken.

Appellant has had two trials, each by an able and impartial judge, with the same result each time.

There is no error in the record.

Judgment affirmed.

Filed March 4, 1896.

No. 17,716.

TOMLINSON v. CITY OF INDIANAPOLIS.

LICENSE.—Use of Streets.—Market Wagon.—City.—Nonresident.—

A nonresident of a city may be lawfully compelled to pay a license for driving a market wagon upon its streets, when no discrimination is made against him on account of his nonresidence.

SAME.—Toll for Use of Streets.—Vehicle.—A toll for the use of the streets, instead of a tax on personal property, is imposed by a license fee charged on vehicles.

SAME.—For Use of Streets.—Vehicle.—Reasonableness of Toll.—The fact that some revenue arises to a city from fees collected from licenses for the use of streets by vehicles, and that it is applied to the repair of the streets, does not render a license of \$3.00 per year for a one-horse market wagon unreasonable.

SAME.—Toll for Use of Street.—Vehicle.—Police Power.—The police power, and not the taxing power, is exercised in licensing the use of vehicles on streets.

SAME.—Power of City to Exact License for Use of Street.—Vehicle.—The power to license, and to exact a reasonable license fee, for the use of streets and alleys by vehicles, is within the power of a municipality, under a statute giving power to regulate such use.

From the Marion Superior Court.

McCullough & Spaan, for appellant.

J. B. Curtis, for appellee.

HOWARD, J.—By section 23 of the act in force March 6, 1891, known as the Indianapolis City Charter (section 3794, R. S. 1894), it is provided that the Common Council of said city shall have power to enact ordinances for certain purposes therein named, amongst others, "To regulate the use of streets and alleys by vehicles;" and "To license, tax and regulate wheeled vehicles, provided that the funds derived therefrom shall be applied only to the maintenance and repair of streets and alleys."

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In pursuance of these provisions of the statute, the Common Council of said city passed general ordinance No. 61, 1893, entitled "An ordinance providing for license upon vehicles drawn upon the streets of the city of Indianapolis," etc.

In section 1 of said ordinance, certain annual license fees are specified to be paid by the owners of the several varieties and kinds of vehicles "used upon the streets of the city of Indianapolis," no limitation being made as to residence or other qualifications of such owners.

In section 2 of the ordinance, provision is made for licensing vehicles used by market gardeners, fruit-growers, florists, hucksters, liverymen and others hauling goods or merchandise to or out of said city, particular reference being had to persons living outside said city but doing business in the city. In all these cases the license fees are the lowest charged for the corresponding vehicles named in the first section, unless it be in the case of four-horse wagons used for hauling brick or ice.

Other sections provide in detail for the paying of fees and issue of license; for numbering the vehicles, and lighting them at night; for the width of tires; for penalties for violation of the ordinance; and for the use of the funds derived from the license in the repair of the streets and alleys of the city.

The appellant was arrested for the violation of sections 1, 2, and other sections of the ordinance, and on appeal to the court below was found guilty and fined. He assigns as error on this appeal that the court overruled his motion for a new trial. The reasons given in the motion for a new trial were that the finding and judgment were contrary to law and contrary to the evidence.

The appellant was a non-resident of the city and en-

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gaged in market gardening, having a stand in the city to which he brought the products of his garden, without having procured a license for his market wagon.

The only question to be decided is whether it was unlawful to require appellant, a non-resident of the city, to pay a license fee, such as residents are required to pay, for driving his wagon upon the streets of the city.

He was charged with violating section 1 of the ordinance, as well as section 2. His was a one-horse wagon, used to bring vegetables to market. Under section 1 such a vehicle, whatever used for, or wherever the residence of its owner, is subject to an annual license fee of \$3. Under section 2, the wagon, being a one-horse wagon owned by a person engaged as a gardener, is subject to the same annual license fee of \$3.00.

We are unable to see in this any discrimination against appellant. Indeed, it would seem that the second section of the ordinance was framed simply to name and fix license fees for that class of vehicles used by those who haul provisions and other articles into or out of the city, but who use the streets substantially the same as those whose wagons are driven entirely within the city limits. An inspection of the two sections shows that the non-resident owners of vehicles are rather more favored than the resident owners.

The only contention, in truth, which can be plausibly urged against the ordinance is that it charges those who drive upon the streets, but live outside the city limits, the same license fees charged against those residing in the city; and we do not think that the ordinance can, for this reason, be held invalid.

The Common Council, as we have seen, is given by the statute power to pass ordinances "to regulate the

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use of streets and alleys by vehicles." This provision would of itself be sufficient authority to sustain the ordinance. The power to regulate implies the power to license and to exact a reasonable fee for such license. *Smith v. City of Madison*, 7 Ind. 86; *City of Anderson v. O'Conner*, 98 Ind. 168; *Scudder v. Hinshaw*, 134 Ind. 56.

But the statute further expressly provides that the council may pass ordinances "to license, tax and regulate wheeled vehicles." This is a police power, and not a taxing power. *City of Indianapolis v. Bieler*, 138 Ind. 30. The fee charged is but \$3 per year. Nor is it any objection to this conclusion that some revenue arises to the city from the fees collected, or that such revenue is applied to the repair of the streets. The streets are used and in part worn out and put in a condition needing repair by the vehicles that are charged the license fee. See *City of Rochester v. Upman*, 19 Minn. 108; *State v. Cassidy*, 22 Minn. 321. Instead of being a tax on personal property, the license fee is rather in the nature of a toll charged for the use of the improved streets over which the vehicles are driven.

No discrimination whatever having been made against appellant on account of his residing outside the city limits, we have been unable to discover any good reason why he should not pay a license for his vehicle as well as any other person making like use of streets of the city. Indeed, he is at an advantage as compared with the city resident; he has paid no taxes to improve the streets and yet he uses them day after day in his business quite the same as a resident. It is manifestly but just that not having paid to improve the streets, he should at least pay the same

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license fee for using them as is paid by those who have themselves paid their share of the cost of improving the streets. If this ordinance favors any one it is the non-resident rather than the resident.

The judgment is affirmed.

Filed March 4, 1896.

NOTE—On the question of discrimination between the residents of a municipality and other residents of the same State in municipal regulations, see note to *Sayre v. Phillips*, (Pa.) 16 L. R. A. 49.

No. 17,649.

SALEM-BEDFORD STONE CO. v. HOBBS, ADMINISTRATOR.

BILL OF EXCEPTIONS.—*Record Entry of Filing.*—*Appeal.*—If there is no showing in the transcript of the record, that what purports to be a bill of exceptions was ever filed in the office of the clerk of the trial court, the bill and the evidence contained therein are not properly in the record.

PLEADING.—*Complaint.*—*Master and Servant.*—*Assumed Risk.*—A complaint by an administrator of a decedent, who was an employe in a stone-quarry yard, alleging that the decedent's death was caused by a stone falling on the decedent while in line of duty as hooker, which stone was sitting on edge on loose-made earth, and avers that the loose-made earth was liable to cause the stone to fall over, is not sufficient, where it does not appear that the loose-made earth did cause it to fall over and inflict the injury complained of.

From the Lawrence Circuit Court.

Dunn & Lowe, for appellant.

J. R. East, R. Miller, W. H. Martin and *J. E. Boruff*, for appellee.

MCCABE, J.—The appellee, as administrator of the estate of James F. Hobbs, deceased, sued the appel-

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lant in the circuit court, in a complaint of but one paragraph, for negligence in causing the death of said decedent.

A trial of the issues joined resulted in a verdict and judgment against appellant for \$1,750, which judgment upon appeal to the Appellate Court was reversed because the evidence did not support the verdict, that court holding that the evidence showed that the danger from which the decedent's injury resulted was one which was incident to the service in which he was engaged and the risk of which he had assumed in his contract of employment. *Salem-Bedford Stone Co. v. Hobbs, Admr.*, 11 Ind. App. 27.

On the return of the cause to the circuit court, the complaint was amended by filing a second paragraph, presumably to meet a suggestion made in the opinion of the Appellate Court that the action could only be maintained by alleging and proving that "the proximate cause of the injury was a latent or concealed defect or imperfection, which might, on reasonable inspection, have been discovered by appellant."

The trial court overruled a demurrer for want of sufficient facts to that paragraph.

The issues joined were again tried by a jury, resulting in the verdict and judgment, over appellant's motion for a new trial, for \$5,000.

Error is assigned on the action of the trial court in overruling the demurrer to the second paragraph of the complaint and in overruling the motion for a new trial.

Appellant's counsel urge with great confidence that the evidence no more supports the verdict this time than it did when the case was decided by the Appellate Court. But unfortunately for the appellant the appellee's learned counsel urge with equal confidence that there can be no reversal on that ground, for the

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reason that the evidence is not legitimately a part of the record.

It is claimed by the appellee that there is no showing in the transcript that what purports to be the bill of exceptions incorporating the evidence was ever filed in the office of the clerk of the court below.

And we find, on examination, that this claim is fully sustained by the record, there being no showing or statement in the transcript anywhere that such a bill of exceptions was ever filed.

And there is no response made by the appellant's counsel to this contention. They evidently have never seen the appellee's brief, or, if they have, know as a matter of fact that the bill of exceptions was never filed with the clerk below. But we have reasons to surmise that the bill was filed with the clerk below, and he has failed to so state in the transcript.

One reason for such a surmise is that there comes up so many transcripts from that court embracing what purports to be bills of exceptions without any statement therein that the same have been filed.

It is hardly supposable that the lawyers there are laboring under the mistaken belief that a bill of exceptions that has never been filed in the clerk's office, but is being carried around in somebody's pocket, can be certified here so as to become a legitimate part of the record.

If the bill was in fact duly filed, it was the duty of appellant's attorney to see to it before the transcript was filed here, that it stated that fact and not rely upon the legal opinion of the clerk as to what it takes to constitute a valid transcript. And the appellant's attorney has not fully discharged his duty when he has filed a brief on behalf of his client. He should see and read carefully the brief on behalf of the appellee,

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and if need be make such reply or take such steps as appellee's brief seems to call for.

Appellee in his brief may be able to point out defects in the transcript or record fatal to the appeal which have escaped the notice of vigilant counsel on the other side, and which, if taken in time, can be rectified on a writ of *certiorari*. If, in fact, this bill of exceptions was duly filed in the clerk's office below, a writ of *certiorari* could have compelled the clerk to so certify. But it is not only no part of our duty to suggest to counsel what they ought to do to present their causes to this court, but propriety forbids us to indulge in such a practice.

But, however strongly we may suspect that a bill of exceptions has been filed, yet the statute requires it to be filed before it can become a part of the record. R. S. 1894, section 641 (R. S. 1881, section 629). And so complaints, answers, replies and demurrers must be filed before they become parts of the record. How is this court to know that they have been filed so as to become a part of the record? That must be proven by the clerk so stating in the transcript. We are not authorized to guess it into the record.

But it is fully settled, in a long line of cases, that the bill of exceptions is not a part of the record unless the transcript states that it was filed in the office of the clerk of the trial court. *Armstrong v. Dunn*, 143 Ind. 433, and cases there cited; *DeHart v. Board, etc.*, 143 Ind. 363, and cases there cited; *Ueker, Admx., v. Bedford Blue-Stone Co.*, 142 Ind. 678, and cases there cited.

And if counsel had paid proper attention to the record, they might have secured a decision as to whether the evidence supports the verdict and enables the appellee to maintain the action, and thus put

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an end to litigation. But now if appellant secures a reversal, it must leave the cause open for future litigation.

It appears from the second paragraph of the complaint that appellant was operating a stone yard in connection with its stone quarry, steam stone saw mill, engine, derricks, or traveling derricks, or travelers on a tramway; that the derrick, called a traveler, was used to raise and move blocks of stone over and around the stone yard; that appellant had piled blocks of stone in this yard in miscellaneous heaps of irregular shapes and sizes in lengths and width, piled upon loose earth and dirt mixed with spalls or small pieces of broken stone, and which, it was alleged, the appellant had carelessly and negligently failed to prop or stay said stone, or any of them; that it had carelessly and negligently placed a large stone nine feet long and five feet wide and fifteen inches thick on its edge, each end resting on two small irregular stones, which were placed on loose dirt, and that said large stone was in no manner propped or stayed so that the employees of the company could work safely around and about it, and that said stone so situated and placed rendered the place dangerous and unsafe to defendant's employees, and had been allowed to so remain for three months prior thereto; that the employment of deceased was to work in said stone yard as a hooker, whose duty in connection with another employee, was to fasten or hook the hooks called dogs attached to the derrick onto blocks of stone in said yard in order to raise them. And that while attempting to hook onto another stone, said large stone, so setting on its edge, fell over on him, causing his death, without any fault on his part; that he left a widow, etc.

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The foregoing is substantially the same as the first paragraph on which the case was tried, but owing, presumably, to the suggestion of the Appellate Court, the second paragraph was added, differing from the first in some averments as to the dirt on which the stone rested, the substance of which is as follows: That said small stones rested on loose-made earth, liable to press down on one side and allow said unpropped stone to fall over; that the dangerous condition of said smaller stone could not, without close inspection, be seen by the employees working about it, for the reason that said dirt was hidden from view and appellant negligently failed to inspect the earth and condition of said smaller stones upon which said larger stone rested, and had it done so it could readily have known that said stone so situated was in danger of falling over.

The hidden or concealed defect or imperfection about the unpropped stone, for the absence of which the Appellate Court adjudged that the risk was one incident to the employment and was assumed by the decedent, was attempted to be supplied by the above averments about the loose new made earth or dirt hidden from view.

Whether that has been successfully done depends on the following allegations: "That * * * deceased, while in the line of his duty * * * without any knowledge of the dangerous condition of said stone, the smaller stones upon which it rested and the dirt beneath, and without being able to see the condition of the earth beneath said stones, attempted to hook onto another stone near by in obedience to the order of the company, then and there given him, and while his face was turned in another direction, the said large stone so resting upon said smaller stones suddenly fell over on and against decedent, so bruising

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and mangling him so that in twelve hours thereafter he died.”

There is no allegation here that the new and hidden or concealed element, namely, the loose new made earth had anything whatever to do with the large stone falling over on the deceased. Nor is there any allegation anywhere else in the paragraph conveying such an idea. It is only by the most liberal construction of the language just quoted that it can be said to convey the idea that the decedent was ignorant of the loose new made earth. Indeed, the averment is that that was the condition of the whole yard under all the stones piled therein without alleging his ignorance of that fact. But extending the most liberal intendment to the language quoted so as to ascribe to it the meaning that the deceased was ignorant of the loose-made earth under this particular stone, yet the existence of such loose dirt and his ignorance thereof does not help the pleading any, unless such soft dirt had some effect in causing the stone to fall over. The averment that it was liable to cause it to fall over is not sufficient unless it in fact did cause it to fall over. That fact is not alleged.

Therefore, the pleading stands as if there was no allegation in it about the loose new made earth or dirt. That element being eliminated, it appears that the deceased knew as much as his employer about the danger from which he was injured. That is, he knew that stones were piled in miscellaneous heaps on loose dirt in the yard, and that they were unpropped, and that the stone which fell on him was five feet wide, nine feet long and fifteen inches thick, was standing in the yard on its edge and that it had been so standing for some length of time. Whether he knew it had been standing in that condition three months is not stated. Common sense would teach any man that

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such a stone in such situation would be liable to fall over. Enough is disclosed in the paragraph to show that there were other dangers of the same class incident to the employment in which the decedent was engaged.

In the *Evanville, etc., R. R. Co. v. Duel*, 134 Ind. 156, at p. 159, it was said: "Another rule, now firmly established, is that where the servant knows of the defect in the machinery, or the danger in the place where the is working, or of the want of skill of fellow servants, and, with such knowledge, voluntarily continues in such employment, he thereby exonerates the master from liability and is held to have assumed the risks incident to such defects, dangers, or want of skill. * * [Citing authority.] Out of this rule has necessarily grown the conclusion that the action for a violation of the employer's duty involves more than mere negligence and contributory negligence, and includes a denial of the assumption of the hazard." Citing *Louisville, etc., R. W. Co. v. Corps*, 124 Ind. 427, where Judge Elliott, speaking for the court, said: "For anything that appears in the complaint the peril was a known incident of the service and was one assumed by the plaintiff, and if it was, there can be no recovery."

It may not be necessary, in all cases, to make a good complaint by a servant against his master, for an injury sustained by the servant through his master's negligence, while engaged in such master's service, to deny in the complaint the assumption of the risk by the servant, or to aver that the risk was not a known incident to the service. But in a case like the ones from which we have quoted and the one now before us, where the facts set forth in the pleading strongly tend to show that the danger from which the injury complained of resulted, was a known incident to the ser-

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vice, the complaint cannot be made good without a denial of the assumption of the risk in the complaint or a denial that it was a known incident to the service in which the servant was engaged when injured, if the facts and circumstances stated do not necessarily imply such denial. See *Peerless Stone Co. v. Wray*, 148 Ind. 574.

For these reasons the second paragraph of the complaint does not state facts sufficient to constitute a cause of action.

The judgment is reversed, with instruction to sustain the demurrer to the second paragraph of the complaint.

Filed February 12, 1896.

No. 17,681.

GILLILAND ET AL. v. MILLIGAN ET AL.

144 154
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NEW TRIAL.—*As of Right.*—*Writ of Assistance.*—A motion or petition for a writ of assistance for the possession of land, is not such an action as entitles a party to a new trial as matter of right, under section 1076, R. S. 1894.

From the Marion Superior Court.

Herod & Herod, for appellants.

H. J. Milligan, for appellees.

MONKS, J.—It appears from the record that Anna A. Milligan recovered a judgment and decree of foreclosure against appellants on the 12th day of April, 1893, in the superior court of Marion county. Afterwards appellees filed a petition in said cause. in said

court, by which it was shown that the real estate described in said decree of foreclosure was sold on said decree by the sheriff of the county to Joseph Milligan, who afterwards died intestate before the year for the redemption of said real estate had expired, leaving as his only heirs the appellees; that he left no debts which were not paid in full, and that after the expiration of the year for redemption from sale, the said real estate not having been redeemed, the sheriff conveyed the same to appellees; that appellants, who were defendants in the proceeding to foreclose said mortgage, refused to surrender possession to appellees, though possession had been demanded by appellees. Prayer for an order upon appellants to surrender possession of said real estate, and that a writ of assistance issue to the sheriff, commanding him to put appellees in possession of said real estate. Notice of said petition was served upon appellants, who appeared to the proceedings and filed a general denial to the petition.

The application was tried by court, November 15, 1894, and an order entered commanding appellants to surrender possession of said real estate to appellees, and that a writ of assistance issue to the sheriff, commanding him to put appellees in possession of said real estate.

Afterwards, on May 28, 1895, appellants filed a motion for a new trial of said cause as a matter of right, and also filed an undertaking with surety as required by law. This motion was overruled by the court, to which ruling of the court appellants excepted at the time.

The only error assigned is that the court erred in overruling appellants' motion for a new trial as of right.

Writs of assistance were awarded by courts of

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chancery, in execution of final decrees. Having decreed a sale and conveyance of real estate, it was considered necessary, in order to give the purchaser the full benefit of his purchase, to put him in possession. This the courts of chancery did as a full enforcement of its judgment and as an incident to the relief given by its decree. The exercise of the power of issuing such writs rested in the discretion of the court, and was never exercised in cases of doubt, nor under color of its exercise was a question of legal title held or determined. The court would not, in such summary way, settled contested legal rights. In such cases the motion for the writ was denied and the party left to his action at law. *Thomas v. DeBaum*, 14 N. J. Eq. 37; *Schenck v. Conover*, 13 N. J. Eq. 227; 78 Am. Dec. 95, and note 101; *Van Meter v. Borden*, 10 C. E. Green, 414; *Barton v. Beatty*, 28 N. J. Eq. 412; *Valentine v. Teller*, 1 Hopkins, Ch. 480; *Stanley v. Sullivan*, 71 Wis. 585; 5 Am. St. Rep. 245, and cases cited in note on page 250; Freeman Execution, section 37a; 2 Daniel, Ch. 1062, note 3, and cases cited; see 2 Ency. Pl. and Prac., 975–986, where this question is fully considered and the authorities collected.

It follows, therefore, that a motion or petition for such writ is not such an action as entitles a party to a new trial as a matter of right, under section 680, R. S. 1881 (section 1076, R. S. 1894).

No question is presented concerning the power of the courts in this State to issue writs of assistance, as was done in this proceeding. There is no available error in the record.

Judgment affirmed.

Filed February 12, 1896.

Bever v. Bever.

No. 17,494.

BEVER v. BEVER.

EVIDENCE.—Parol.—Deed.—Reservation of Life Estate as Security for Contract of Maintenance.—A reservation of a life estate in a deed may be shown by parol evidence to have been intended merely as security for the performance of the agreement by the grantee to support the grantors during their lives.

From the Fountain Circuit Court.

V. E. Livengood and Livengood & Livengood, and Clodfelter & Thompson, for appellant.

Nebeker & Simms and J. W. Newlin, for appellee.

MONKS, J.—This action was brought by appellant against appellee. The complaint is in two paragraphs, the first of which was to recover possession of real estate, with damage for its detention, and the second to quiet title thereto in appellant during her life.

Appellee filed a general denial, and the cause was tried by a jury, and a special verdict returned, upon which, over a motion by appellant for a judgment in her favor, and over a motion for a new trial, judgment was rendered in favor of appellee, to which appellant excepted.

The special verdict, so far as necessary to determine the questions presented on this appeal, was as follows:

“On the 6th day of August, 1890, Henry Bever, senior, was the sole owner in fee simple of the real estate in controversy; appellant was his wife and appellee his son; Henry Bever, senior, was old and feeble, about 78 years old, and was desirous of mak-

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Bever v. Bever.

ing a division and distribution of his estate; he had six children, including appellee. He had made no advancement to appellee or his daughter, Mary, but had advanced to each of his other children large sums of money. Said Bever, senior, was indebted to appellee in the sum of \$2,400 for work and labor. On August the 6th, 1894, Henry Bever, senior, sold said real estate to appellee for \$11,200; that as a payment on the purchase-money \$2,200 as an advancement, and \$2,400 for said indebtedness was allowed. Bever, senior, to equalize all his children with the \$2,200 advanced in said land to appellee, executed his notes, secured by mortgage on said real estate, payable to his said children, amounting in all to \$3,439.50, which appellee assumed and agreed to pay as a part of the purchase-money for said real estate, and also agreed to pay \$1,200 cash to said Mary Bever, thereby making her advancement with the note executed to her \$2,200. It was further agreed, as a part of said purchase price of said real estate, that appellee should support said Henry Bever, senior, and his wife, the appellant, so long as either of them should live, and it was further agreed as a part of said sale and purchase that said Bever, senior, and his wife should occupy and have the use of the residence on said premises. On August 6th said Henry Bever, senior, and appellant, his wife, executed to appellee a warranty deed, conveying said real estate to him in fee simple, except that after the granting clause in said deed, and after a description of the premises, there was inserted the following, to-wit:

“The grantors herein except and expressly reserve from this grant a life estate into and upon all said real estate in favor of said Henry Bever and Mary Bever, and the said Henry Bever and Mary Bever hold, retain and reserve a life estate during their

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natural lives in their favor upon all said real estate and out of the same.”

The provision contained in said deed, excepting and reserving a life estate, was inserted, and such life estate was reserved by said grantors solely for the purpose and with the understanding and agreement that the same was to secure the grantors in the possession of said residence, and to secure the performance by appellee of his agreement to support the said grantors; and it was further agreed at the said time, by and between said grantors and said grantee, that the whole estate in fee simple, including said life estate, should pass and be transferred to said grantee, except that the legal title to the real estate mentioned in said deed should remain in said grantors as security, as aforesaid; and it was further agreed by and between said grantors and grantee that the possession of said premises, except the residence, be turned over and surrendered to said appellee, the grantee, and should continue in his possession unless he should fail to perform said agreement, and that he should have the use, proceeds, rents and profits of said real estate during the lifetime of said grantors so long as he should perform his contract without the payment of any rent.

On the 6th of August, the grantors placed appellee in full possession of said real estate, except said residence, and appellee immediately took possession, and has ever since said time remained in and now is in exclusive possession of said premises, and is using the same for farming purposes.

In the fall of 1890, appellee placed upon said premises a house of the cost and value of \$1,000, and made other lasting and valuable improvements, all with the consent and knowledge of the grantors and at his own expense.

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Appellee has, from the date of said deed, paid all the taxes on said real estate, including the taxes due in the spring of 1894. The grantors have never paid or offered to pay the same to him. Henry Bever, senior, died May 18, 1893. From the date of said deed appellee furnished reasonable support to grantors, and gave them all the support that they or either of them required of him, and ever since the death of his father, appellee has furnished appellant reasonable support, and has furnished to her all the support she required or requested. Since November, 1893, and ever since the commencement of this action, appellee has furnished to the appellant, and she has received from him, her support, including groceries, provisions, money and clothing, firewood, and such other articles as she needed, and ever since the death of her husband, and up to the time of this trial, the plaintiff has called upon the appellee for her support, and the same has been furnished by appellee to appellant, and has been received by her under and in pursuance of said agreement by appellee to support said grantors during their lives.

Appellee has at all times been ready and willing to perform his said contract so made with Henry Bever, senior, and has kept and performed the same. The house, which was on said real estate at the date of said deed, has ever since been occupied by the grantors.

In November, 1893, appellant, by one Pursely, her son-in-law and agent, ordered appellee to quit the possession of said premises, which he refused to do, upon the ground that he was the owner thereof. Afterwards appellant consented that appellee remain in possession of said real estate, and directed him to put in a crop, which he did."

Appellant insists that the court erred in rendering

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judgment on the special verdict in favor of appellee; "that the deed reserved her a life estate, and the parol agreement set out in the special verdict, and made before or contemporaneous with the execution of the deed, cannot enlarge, diminish or vary the terms of the deed, or render inoperative and defeat the terms of this life estate; that such findings contradicting the terms of the reservation in the deed should have been disregarded and judgment rendered for appellant."

It is the general rule that in the absence of fraud or mistake parol agreements made before or contemporaneously with a written contract cannot be given in evidence to contradict, vary or modify the writing. *Coy v. Stucker*, 13 Ind. 161; *Hostetter v. Auman*, 119 Ind. 7.

In *Phillbrook v. Emswiler*, 92 Ind. 590, this court approved the rule in this language: "Nothing is better settled than that where two parties have entered into a written contract, all previous negotiations and propositions in relation to such contract, whether parol or written, are to be regarded as merged in the final agreement. *King v. Enterprise Ins. Co.*, 45 Ind. 43."

It has also been held by this court that by the execution of a deed the preliminary contract is executed, and any inconsistencies between its original terms and those in the deed are to be explained and settled by the deed alone. *Phillbrook v. Emswiler*, *supra*; *Cole v. Gray*, 139 Ind. 396.

A deed, however, as a general rule, does not state the entire contract, and such is not the purpose of its execution. It is the evidence of the consummation of a part of some contract previously made. It is not the purpose of a deed to state how, when or in what man-

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ner the consideration shall be paid. *Davis v. Hopkins*, (Col.) 32 Pac. Rep. 70; *Trayer v. Reeder*, 45 Ia. 273.

It is also settled law that the real consideration of a deed may be shown by parol evidence, although it be different from the consideration stated in the deed. *Hays v. Peck*, 107 Ind. 389.

Under a deed of general warranty, it may be proven by parol evidence that the grantee assumed and agreed to pay any lien or incumbrance as a part of the consideration, when the same is not mentioned in the deed. *Carver v. Louthain*, 38 Ind. 530; *McDill v. Gunn*, 43 Ind. 315.

It is equally well settled that a deed, absolute on its face, may be shown by parol evidence to have been executed only as a mortgage. *Ashton v. Shepherd*, 120 Ind. 69; *Tuttle v. Churchman*, 74 Ind. 311; *Crane v. Buchanan*, 29 Ind. 570; *Chase's case*, 17 Am. Dec., note on page 300; 4 Am. St. Rep., note on page 707; *Stewart Mortgages*, section 38.

This court said in *Hanlon v. Doherty*, 106 Ind. 37: "It is a familiar rule of equity, that a deed, although absolute on its face, is nothing more than a mortgage when executed to secure an existing debt; no matter what form a transaction may assume, if it appears that the instrument was executed to secure a subsisting debt, it will be adjudged to be a mortgage." 4 Am. St. Rep., note, pages 697-708. The grantor may, in the deed, by express reservation, create an equitable mortgage to secure the unpaid purchase money, whether payable in money or otherwise; the reservation of such lien is equivalent to a mortgage taken contemporaneously with the deed, and gives the purchaser the right of redemption. *Lucas v. Hendrix*, 92 Ind. 54, and cases cited; *Harvey v. Kelly*, 41 Miss. 490, 93 Am. Dec. 267; *Davis v. Hamilton*, 50 Miss.

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213; *Moore v. Lackey*, 53 Miss. 85; *Deason v. Taylor*, 53 Miss. 697, 700; *Heist v. Baker*, 49 Penn. St. 9; *Markoe v. Andras*, 67 Ill. 34; *Carpenter v. Mitchell*, 54 Ill. 126; *Dingley v. Bank of Ventura*, 57 Cal. 467; 4 Am. St. Rep., note p. 706; 6 Am. and Eng. Ency. of Law 682, note p. 4; 28 Am. and Eng. Ency. of Law 184-189, and notes; 1 Pingrey Mortgages, section 320; 1 Jones Mortgages, sections 228-229; Stewart Mortgages, section 27, notes 10, 11 and 12.

This court held in *Lucas v. Hendrix*, *supra*, that a warranty deed in the statutory form, containing a provision that upon the payment of a sum of money to the grantor the grantee shall be seized in fee simple and that payment may be compelled by suit, creates an equitable mortgage in favor of the grantor.

In *Carr v. Holbrook*, 1 Mo. 240, it was held that a deed made for land to be absolute on the payment of certain notes, but in default of payment to be void, was to be considered a mortgage. *Pugh v. Holt*, 27 Miss. 461, is to the same effect.

It is clear from these authorities that the grantor in the deed in controversy might have inserted a provision in the deed that a lien was reserved on the real estate to secure the payment of the unpaid purchase-money, whether payable in money or support and maintenance of the grantors, and the same would have been an equitable mortgage on the entire estate. Upon the same principle, if it had been written after the reservation of the life estate in the deed executed in this case, that said life estate was reserved to secure the payment of the unpaid purchase-money, however payable, the same would have been an equitable mortgage on such life estate, the same in effect as if the whole estate had been conveyed to appellee, and he had executed a mortgage conveying said life estate

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to the grantors to secure the said unpaid purchase money. 4 Am. St. Rep. 706, note and authorities, *supra*.

This brings us to the final question: may it be shown by parol evidence that the reservation of the life estate was made to secure payment of the unpaid purchase-money, payable in support and allowing grantors to reside on the premises?

If a deed absolute in form may be shown by parol evidence to have been executed as a mortgage, it as conclusively follows that a reservation in a deed may be shown by parol evidence to have been executed as a mortgage.

The conclusion we have reached disposes of the question presented in regard to the parol evidence admitted over appellant's objections. Considering the reservation as an equitable mortgage, the right of possession under the deed is in appellee. *Parker v. Hubble*, 75 Ind. 580; *Chitwood v. Trimble*, 2 Baxt. 78.

The parties have so construed the deed: possession was given by the grantors and taken by appellee when the deed was executed, and has been held until the commencement of this action by appellee, who has made improvements and paid the taxes and kept the premises in repair with the full knowledge of the grantors and without objection from them. *Johnson v. Gibson*, 78 Ind. 282, and cases cited; *Lyles v. Lascher*, 108 Ind. 382; *Dwenger v. Geary*, 113 Ind. 106, 122.

It follows that the court did not err in rendering judgment on the verdict in favor of appellee.

The case of *Ikerd v. Beavers*, 106 Ind. 483, cited by appellant, is not in point here, as neither party to this case is seeking to enforce specific performance of any

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contract or to set aside a contract. There is no available error in the record.

Judgment affirmed.

Filed November 8, 1895; petition for rehearing overruled February 12, 1896.

No. 17,598.

MCGREW v. GRAYSTON ET AL.

APPEAL.—Partition.—Estoppel.—A defendant in partition, who has sold the premises allotted to him under the judgment, is estopped from maintaining an appeal from such judgment.

From the Huntington Circuit Court.

J. B. Kenner and U. S. Lesh, for appellant.

H. B. Sayler, S. M. Sayler and J. M. Sayler, for appellees.

MCCABE, J.—The appellee, Mary C. Grayston, sued the appellant for partition. The court overruled a demurrer to the complaint for want of sufficient facts. The defendant answered by a general denial and affirmative answers, to which the plaintiff replied by a general denial and several affirmative replies. A trial of the issues by the court resulted in a special finding of the facts at the request of the defendant, upon which the court stated certain conclusions of law favorable to the plaintiff, and upon which the court rendered judgment of partition in accordance with the prayer of the petition, over appellant's motion for a new trial. There was no ex-

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ception to the conclusions of law. No error is assigned thereon.

The errors assigned are on the action of the court in overruling the demurrer to the complaint and overruling the appellant's demurrer to the second, third and fifth paragraphs of appellee's reply.

We are met by a verified answer in bar of the appeal by the appellees. After the report of the commissioners in partition had been confirmed, and the judgment rendered and before the motion for a new trial had been passed on, it was made to appear that the plaintiff, Mary C. Grayston, had sold and conveyed the portion of the real estate set off to her to Daniel Kitch. The court thereupon sustained a motion to substitute said Kitch as plaintiff.

He filed a plea in bar of the motion for a new trial, which plea, on motion, was struck out.

The answer in bar of the appeal states that after the rendition of the judgment of partition, on October 24, 1894, the commissioners to make partition were selected by agreement of the parties and appointed by the court accordingly; that appellant filed exceptions to their report, which were tried by the court, overruled and judgment of partition rendered. After said final judgment, to-wit: on December 15, 1894, the appellant sold the lands set off to him to Jacob Boos for the sum of \$10,000, and he conveyed the same to said Boos by warranty deed, and put him in possession thereof. On December 17, 1894, said Kitch, well knowing all the facts herein alleged and relying on them as having been done in good faith, purchased of the appellee, Grayston, the lands, set off to her for the full value thereof, to-wit: \$5,400.00, and said Mary C. Grayston, her husband joining, conveyed her said portion of said lands so set off to her to said

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Kitch; that she had for years before the rendition of said judgment, claimed to own the undivided one-third of the real estate described in the complaint, which claim was open and notorious.

Wherefore appellees say that the appellant ought not to prosecute an appeal of said cause or in any way call in question the title and ownership of the land so acquired by the substituted appellee, Daniel Kitch.

The only fact alleged in this answer in bar of the appeal which has any resemblance to matter in bar of an appeal is that relating to the sale by the appellant of the portion of the lands set off to him after the judgment confirming the partition.

The right of appeal, though conferred by statute, may be forfeited and waived in many ways. It is an established principle of law that a party cannot prosecute an appeal and thereby seek to reverse a judgment, the benefits of which he has accepted voluntarily and knowing the facts. After such acceptance, he is estopped to reverse the judgment on error, and the same may be treated as a release of errors. *Newman v. Kiser*, 128 Ind. 258; *Sterne v. Vert*, 108 Ind. 232; *Baltimore, etc., R. R. Co. v. Johnson*, 84 Ind. 420; *Patterson v. Rowley*, 65 Ind. 108; *State, ex rel., v. Kamp*, 111 Ind. 56; *McCracken v. Cabel*, 120 Ind. 266; *Sterne v. Vert*, 111 Ind. 408; *Clark v. Wright*, 67 Ind. 224; 2 Ency. of Pl. and Pr. 174-175, and authorities there cited; *Glassburn v. Deer*, 143 Ind. 174.

This rule is founded on the principle that a party in a court of justice will not be allowed to acquire advantages by assuming inconsistent positions.

The case of *Sterne v. Vert*, 108 Ind. 232, *supra*, was something like the present case. There it was sought to foreclose a mortgage on three separate tracts of land. The defendants resisted the foreclosure as to

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one tract only. Such resistance resulted in the defeat of the foreclosure as to that tract, but there was a decree of foreclosure as to the other two tracts. From that decree the plaintiff in that case appealed to this court. The appellees thereupon filed in this court a verified special answer in bar of the errors assigned, alleging therein that after the judgment and decree were rendered in the trial court, the appellant caused a copy of the decree and order of sale to be issued out of the office of the clerk of the circuit court, and placed them in the hands of the sheriff, who proceeded to advertise and sell the two tracts of land embraced in the decree. It was averred that at such sale the appellant became the purchaser of both tracts of land so sold, for the sum of \$1,050.00, the proceeds of which, it is charged, she received before prosecuting this appeal. It was there said, at page 234, by Mitchell, J., speaking for the court, that: "A party cannot accept the benefit of an adjudication and yet allege it to be erroneous. It does not alter the case that there was no controversy respecting the several tracts, upon which the decree was given in appellant's favor. The appeal was, and must of necessity have been from the whole decree as given. Having availed herself of so much of the decree as was favorable to her, both the statute (section 632) and the common law affirm that an appeal is thereafter denied to the appellant. Any other rule might result in bringing about embarrassing complications, and manifest injustice to the appellees, in case a reversal of the decree should result. * * * If she may now hold on to what she has thus acquired, and yet reverse the judgment so far as it is unfavorable to her, the appellees will not be in the same situation they would have occupied in case the reversal had been secured before the sale of the other tracts. When the decree ap-

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pealed from was rendered, the appellant had the election either to appeal or adopt the decree as it was, and avail herself of its benefits. Having decisively elected to pursue the latter course, she must now be confined exclusively to the course first adopted. Every consideration leads to the conclusion that the appeal cannot now be maintained."

The foregoing language is very applicable to the present case. It is true, here the undivided two-thirds of the lands, as alleged in the complaint, belonged to the defendant and was not in controversy in the suit. But according to the plaintiff's contention, she owned, as she alleged in her complaint, the undivided one-third of said lands. That claim extended to and permeated every inch of that portion of the lands that was set off to the defendant by metes and bounds in the decree and continued to hamper and cloud his title to all of it until the plaintiff's claim was extinguished as to that part by the decree setting off to her another portion. That enabled him to sell the tract then set off to him free from her claim. In so selling it, he secured the whole of the purchase-price, \$10,000, free from any claim in the plaintiff to share therein. It cannot be said that he did not, in so doing, accept the benefits of the decree or that it did not benefit him. It may be that he was entitled to all the land, freed from the appellee's claim. That, however, could only be established by a decree to that effect after a trial of the issues. Until such decree, her claim was a cloud on his title to every inch of the land. The decree removed that cloud as to that part set off to him by metes and bounds, and he accepted the benefits of such removal by selling the same for \$10,000, freed from her claim. He is, therefore, brought within the principle of one accepting the

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benefits of a judgment or decree and thereafter seeking to reverse the same for alleged error in the proceedings. This he cannot do.

This answer in bar of the appeal was filed on the same day the transcript was filed in the office of the clerk of this court, April 19, 1895. On August 28, 1895, the appellant's attorneys endorsed on the transcript immediately following said answer, a waiver of notice of the filing of such answer. Thus they show that they have had notice of its contents nearly three months, and yet they have not denied its truth, or in any manner questioned its legal sufficiency. Therefore, under the established rules of practice in this court, we are authorized to presume that the facts stated in the answer to the assignment of errors are true. *Glassburn v. Deer, supra; Eckert v. Binkley*, 134 Ind. 614.

The appellant having waived the errors alleged, if any were committed in the proceedings leading up to the judgment, by accepting the benefits thereof, his appeal therefrom is dismissed.

Filed November 21, 1895; petition for rehearing overruled February 12, 1896.

No. 17,692.

FRICK v. GODARE ET AL.

DEED.—*Description.—Mistake.*—A mistake in a deed in locating the land conveyed in the “northwest quarter” instead of the “northeast quarter” of a given section, will not prevent the title from passing, where there is an additional description by metes and bounds, which furnishes the means of identifying the land conveyed.

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Frick v. Godare et al.

From the Daviess Circuit Court.

W. H. DeWolf, for appellant.

R. L. Bailey, J. Keith and Gardiner & Gardiner, for appellees.

MONKS, J.—This was an action by appellees against appellant to quiet title to and recover possession of the southeast quarter of the northeast quarter of section twenty-seven, township two north, range eleven west, in Knox county. A demurrer to the complaint for want of facts was overruled. Appellees answered by general denial. A trial by the court resulted in a judgment for appellees. Appellant was granted a new trial as of right, and a second trial resulted in a finding for appellees, and over a motion for a new trial, judgment was rendered quieting appellees' title to said real estate and for the possession of the same.

The first error urged is that the court erred in overruling the demurrer to the complaint. Considered as a complaint to quiet title and for the possession of real estate the complaint was sufficient to withstand the demurrer.

It is claimed that the court erred in overruling appellant's motion for a new trial for the reason that there was not sufficient evidence to sustain the verdict. It appears from the evidence that one Pierre Cabbassier, owned the east half of the northeast quarter of section twenty-seven, township two north, range eleven west, in Knox county, and also other real estate at the time of his death in 1863. After his death the heirs divided his real estate; in this division the north half of said eighty acres, being the northeast quarter of the northeast quarter of said section, was conveyed to Charles Cabbassier, a son of the deceased, and the south half of said eighty acres, being

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the real estate in controversy, fell to Elizabeth Johnson, a daughter of the deceased, and was conveyed to her husband, George Johnson. In this deed the real estate in controversy was described as follows: "The southeast quarter of the northeast quarter of section twenty-seven, in township two north, range eleven west, and bounded as follows, to-wit: beginning at a stake at the southwest corner of Charles Cabbassier's land in said section, hickory 12 in. N. 5 links, elm 8. 1. D. S. 25. W. 43 links, thence east twenty chains to section line, thence south twenty chains to a stake red bud 6 in. S. 5. E. 26 links, and an over cup oak 6 in. N. 13½ east 28 links, thence west twenty chains to a stake, thence north twenty chains to the place of beginning, containing forty acres, being a part of the land owned by Pierre Cabbassier, deceased." This deed was recorded August 14, 1871.

Afterwards George Johnson and his wife sold and conveyed the real estate in controversy to Charles Cabbassier by the same description as in the foregoing deed. This deed was recorded August 16, 1871. Both parties claim title through these two deeds.

At the time this deed and the previous deed were executed, Charles Cabbassier did not own any real estate in section twenty-seven, except the northeast quarter of the northeast quarter thereof, and the description by metes and bounds contained in each of said deeds commenced at the southwest corner thereof, and therefore, we assume, correctly described the southeast quarter of the northeast quarter, which is the land in controversy.

On December 1, 1875, Charles Cabbassier and wife, executed a deed to Francis and Nicholas Horie, by which they intended to convey the real estate in controversy to said grantees. In this deed the real estate was described by metes and bounds, and as being a

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part of the land owned by Pierre Cabbassier, deceased, the same as in the deed to Johnson and the deed to Cabbassier, but by mutual mistake of the parties, the same was also described as the southeast quarter of the northwest quarter of section twenty-seven, instead of the southeast quarter of the northeast quarter of said section. This deed was recorded December 4, 1875. On the same day, December 1, 1875, Nicholas and Francis Horie sold and conveyed said real estate to Eliza Godare. In this deed the real estate was described the same as in the deed from the Cabbassiers to the Hories. This deed was recorded December 6, 1875. Eliza Godare resided on the land for several years and made improvements thereon. She died the owner of the real estate in controversy, and her husband died in 1878 or 1879. The appellees are the only children of Eliza Godare, and at her death and the death of her husband inherited said real estate.

After the death of Eliza Godare, Charles Cabbassier and his wife, in March, 1881, conveyed the real estate in controversy to Adelia Bono and Charles Bono. The real estate was described in said deed as follows: "The southeast quarter of the northeast quarter of section twenty-seven, in township two north, of range eleven west, containing forty acres, being the same tract intended to be conveyed by Pierre Cabbassier's heirs to George Johnson, and by said Johnson and wife to grantor, Charles Cabbassier." Bono and wife conveyed the land to Linson Johnson, who conveyed the same land to one, Byard, who conveyed it to appellant.

The only real estate that Charles Cabbassier owned in section twenty-seven was the east half of the northeast quarter, the north half he received as his share in

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the partition and the south half by and from the Johnsons.

It is a well settled proposition that it is not the office of a description in a deed to identify the land; it is sufficient if it furnish the means of identification, and that the part of the deed describing the premises conveyed shall be construed with the utmost liberality. *Rucker v. Steelman*, 73 Ind. 396, and cases cited on page 407; *Singer v. Scheible*, 109 Ind. 575, and cases cited on pages 583, 584.

An examination of the record by appellant, or by any one under whom he claims, would have disclosed the deeds to George Johnson, to Charles Cabbassier and to Nicholas and Francis Horie, the last deed describing the real estate by metes and bounds, the same as in the two deeds named, the mistake being in the two words northwest quarter instead of northeast quarter. Cabbassier did not own any land in the northwest quarter of the section — his land was in the northeast quarter. The description by metes and bounds in the deed from Cabbassier to the Hories, and in the deed from the Hories to Godare was such a description as furnished the means of identifying the real estate in controversy as that intended to be conveyed by the deed. Such a description is all that is required under the authorities cited. The courses, distances and monuments, together with the corners and the witnesses to the corners, and the location are given as in an official survey made by a surveyor. So that there could not have been any difficulty in locating and identifying the land conveyed by this description in each of the deeds. This description by metes and bounds is the same in all deeds through which appellees claim title, and in each deed clearly describes the same real estate. If these conveyances were not sufficient to vest a perfect title in appellees,

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they were sufficient, at least, to have put any one upon inquiry. Whatever is sufficient to put a party upon inquiry is notice. *Singer v. Scheible*, *supra*, on page 583, and cases cited; *Lodge v. Simonton*, 2 P. & W. (Pa.) 439; *Parker v. Conner*, 93 N. Y. 118, 45 Am. Rep. 178, and notes on pp. 184-190; 2 White & Tudor's Leading Cases, Equity, 145, 153, 154, 189, 192.

We think the finding and judgment of the court are fully sustained by the evidence, and that there is no error in the record.

Judgment affirmed.

Filed February 13, 1896.

No. 17,724.

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144	175
168	204
144	175
167	632

MUNICIPAL CORPORATION.—*City*.—*Void Contract*.—*Street Lights*.—

A contract for street lights for five years, at a certain price per light per year, payable monthly, made by the executive department of public works, when no appropriation for the purpose had been made except for a month or two in advance, is void, where the statute provides that no executive department shall bind the city by a contract, agreement, or in any way to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose, and that all contracts and agreements, expressed or implied, and all obligations of any and every sort beyond such existing appropriations, are absolutely void.

SAME.—*City*.—*Void Contract*.—*Subsequent Appropriation*.—*Ratification*.—Subsequent appropriations for installments coming due on a contract made by city authorities in violation of a statute prohibiting contracts, for which appropriations had not already been made, cannot operate as a ratification of the contract so as to make it binding.

From the Marion Superior Court.

J. E. Scott, for appellant.

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Herod & Herod and Miller, Winter & Elam, for appellee.

MCCABE, J.—The appellee, as receiver of the Sun Vapor Street Light Company, sued the appellant to recover the sum of \$552.75 as an installment due from the city for vapor lights furnished it for the month of January, 1895, under the terms of an alleged contract and seeking certain injunctive relief.

The superior court overruled a demurrer to the complaint, and the defendant, appellant, refusing to plead further, judgment was rendered upon demurrer in favor of appellee.

The only error assigned calls in question the ruling upon the demurrer. It appears from the complaint that the executive department of public works of the city, on September 18, 1893, entered into contract with the Sun Vapor Street Light Company, by which such company covenanted that it would furnish to said city a certain number of sun vapor street lights for a period of five years from said date at a certain price per light per year, payable in monthly installments, and the city covenanted to pay accordingly, and among other things the contract contained the following mutual covenants: "To each of the provisions, conditions and stipulations of this contract, the undersigned, each for itself, hereby covenants, agrees and binds itself, its successors and assigns." Upon the part of the city the contract is executed in the name of the city, by its board of public works, with the city seal affixed, and the contract is also signed by the mayor. It further appears that the appellee was duly appointed receiver of said light company, and as such he had secured the permission of the court appointing him to bring this suit. It is also shown that the monthly installment for which the suit is brought was due and

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unpaid. The ground on which it was sought to defeat the action in the trial court and to reverse its judgment in this court is, that the contract sued on was and is absolutely void because made in violation of the statute. At the date of the contract the appropriations by the common council to the several executive departments of said city for the current expenses of the fiscal year had not been made.

The prior fiscal year had expired August 31, 1893. For that year the council had, on September 26, 1892, appropriated to the board of public works a certain sum for public light, and by said ordinance said appropriation continued and carried to October 1, 1893, unless the appropriation ordinance for the fiscal year ending August 31, 1894, was sooner passed by the council. The appropriation ordinance for the fiscal year ending August 31, 1894, was passed September 21, 1893, and carried an appropriation to said department for public light of \$76,000 for said year. So far as appears by the complaint this appropriation was not more than sufficient to meet the expenses during the fiscal year for which the appropriation was made for public light of all kinds, including gas and electric light upon existing contracts then in force. Upon September 18, 1893, being the day and date upon which the contract sued on was entered into, there remained unexpended of the sum appropriated to said department for public lights for the fiscal year ending August 31, 1893, the sum of \$15,000, which sum was sufficient only to meet the expense of lighting the city by gas, electricity and vapor light for and during the months of September and October, 1893. In other words, the complaint shows that upon the date of the execution of the contract, the appropriation to the department of public works was only sufficient

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to pay upon existing contracts for the current and succeeding month, and even this sum was not available after October 1, because upon that date the appropriation by its terms lapsed.

Subsequent appropriations were made to the department of public works for public light as appears by the complaint, but at no time did the common council authorize the execution of said contract, or take any action to confirm or approve the same. In the last appropriation ordinance, being exhibit G of the complaint, there is an express provision in section 3 that the appropriation for vapor lights, by item 28, under heading "Department of Public Works," the provision is made that it is not to be taken or deemed as a ratification of any contract heretofore entered into by the department of public works of said city, which may not have been authorized by previous appropriations therefor. It is further shown that the board of public works, on December 19, 1894, notified appellee in writing that said city was not bound by said contract, that the same was illegal, and that it would not pay for any lights furnished under said contract by appellee after December 31, 1894.

The appellee, nevertheless, continued to furnish them for the month of January, 1895, and now seeks in the complaint to recover therefor upon said contract.

The board of public works, by the act commonly known as the city charter for said city, is an executive department of said city government, with certain powers conferred to contract on behalf of the city, subject to certain limitations therein prescribed. R. S. 1894, sections 3812-3819. Among these powers is the power: "To contract for the furnishing of gas, either natural or artificial, water, steam or electricity, light or power, to said city or the citizens thereof, by

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any company or individual, and in such contract to fix the price to be charged for the same in such city, subject to ordinances of such city, in relation to consumption by private consumers," provided that such powers can only be exercised pursuant to an ordinance specifically directing the same. R. S. 1894, section 3830, top page 359. The board of public works assumed to act under this power in entering into the contract sued on. This power is subject to the limitations expressed in the statute already mentioned, wherein it is provided that: "The legislative authority of the city shall be vested in a common council." R. S. 1894, section 3780.

"All ordinances, orders, resolutions and motions for the government or regulation of such city, and all ordinances for the appropriation of money, shall originate in the common council. No appropriation shall be made for the payment of money, otherwise than by ordinance, specifying by items the amount thereof, and the department for which such appropriation shall be made." R. S. 1894, section 3789.

Sections 50, 51, 52 and 62 of the act read as follows:

"Sec. 50. It shall be the duty of each executive department, before the commencement of each fiscal year, to submit to the joint meeting of the heads of the departments and of the various boards hereinbefore provided for in section 45, an estimate of the amount of money required by their respective departments for the ensuing fiscal year, stating with as great particularity as possible each item thereof. The comptroller shall at the same time submit a statement or estimate of city expenditures for other purposes, for the ensuing year, over and above the moneys proposed to be used by various executive departments, giving with as great particularity as possible each item thereof. After such meeting, and reports and consultation, the

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city comptroller shall thereupon proceed to revise such estimates for the ensuing year, and the comptroller shall then prepare a report to the mayor of the various estimated amounts required in said comptroller's opinion for each executive department, and for other city expenses, together with an estimate of the necessary per cent. of taxes to be levied. The mayor shall at the next meeting of the common council present such report with such recommendations as he may see fit. It shall be the duty of the committee of finance of said common council thereupon to prepare an ordinance fixing the rate of taxation for the ensuing year, and also an ordinance making appropriations by items for the use of the various executive departments and other city purposes for the ensuing year. Said ordinance may reduce any estimated item for any executive department, from the figure submitted in the report of the city comptroller, but shall not increase the same unless recommended by the mayor. Such appropriation ordinances shall thereafter be promptly acted upon by the common council. If at any time after the passage of such ordinance an emergency shall arise for further appropriations for the use of any department, as certified by such department, as hereinbefore provided, or other purposes during the year, such additional appropriations may be made on the recommendation of the comptroller by a two-thirds vote of the council.

"Sec. 51. No executive department, officer or employe thereof, shall have power to bind such city by any contract, agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of such department, and all contracts and agreements, express or implied, and all obligations of any and

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every sort, beyond such existing appropriations, are declared to be absolutely void.

“Sec. 52. Any city official who shall issue any bond, certificate or warrant for the payment of money which shall purport to be an obligation of such city, and be beyond the unexpended balance of any appropriation made for such purpose, or who shall attempt to bind such city by any contract, agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for such purpose, and remaining at the time unexpended, shall be liable on his official bond to any person injured thereby, and shall be fined in any sum not more than one thousand dollars (\$1,000), and imprisoned in the county jail not more than six months, either, or both.

“Sec. 62. All the expenses incurred or authorized by such board of public works shall be payable out of the general funds of such city appropriated to the use of such board and available for the particular purpose, except where this act specifically directs that the same is to be paid for by assessments against property holders.” R. S. 1894, sections 3821, 3822, 3823, 3833, Acts 1891, p. 137.

The full meaning of the provisions already quoted will be better apprehended by considering in connection therewith the following portion of section 54:

“Sec. 54. It shall be the duty of the comptroller:
* * * To keep separate accounts for each specific item or appropriation made by the council to each department, and require all warrants to state specifically against which of said items the warrant is drawn. Each account shall be accompanied by a statement in detail in separate columns of the several appropriations, the amount drawn on each appropriation, the

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unpaid contracts charged against it, and the balance standing to the credit of the same. He shall not suffer any appropriation to be overdrawn or the appropriation for one item of expense to be drawn upon for any other purpose, or by any department other than that for which the appropriation was specifically made, except on transfers authorized by ordinances." R. S. 1894, section 3825.

It will be seen that by section 50 and those preceding it, the common council is the local legislative and governing body, has exclusive power to levy taxes and to appropriate the revenues and thereby authorize their disbursement.

By sections 51, 52 and 62 the power of the executive departments to bind the city by contract is limited to the revenues for which the levy for the ensuing fiscal year is made, and which has been appropriated to the several departments for the specific purposes by the council as it is advised the same is necessary.

It is conceded in the complaint and appellee's argument that there was no revenue appropriated and available for the specific purpose involved in the contract beyond what would be required to pay the installment on such contract for the current month and the ensuing month of October.

And yet it is contended by the learned counsel for appellee that such contract is not a violation of the statutory provision that: "No executive department, officer or employe thereof shall have power to bind such city by any contract, agreement, or in any way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of such department, and all contracts and agreements, express or implied, and all obligations of any and every sort beyond such existing appropriations, are declared to be absolutely void."

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The installment sued for here is that for the month of January, 1895, far beyond the amount appropriated at the time the contract was entered into. It is only attempted obligations beyond existing appropriations that the statute makes void. And if it has not done so then language cannot be employed strong enough to accomplish that manifest object and intent.

Counsel cite and rely on three cases in this court to uphold their contention that the contract is not in violation of the statutory provision quoted. The first is the *City of Valparasio v. Gardner*, 97 Ind. 1.

It was sought in that case to enjoin the letting of a contract to a water works company for supplying the city with water for a period of twenty years at an annual expense to the municipality of \$6,000. It was alleged that the corporate indebtedness then exceeded 5 per centum of the assessed value of the taxable property of the city, and that there was no money in the treasury.

The ground on which it was sought to maintain the action was that the proposed contract would be in violation of Article 13 of the constitution, adopted March 14, 1881, which provides that: "No political or municipal corporation in this State shall ever become indebted in any manner, or for any purpose, to an amount, in the aggregate, exceeding 2 per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporation, shall be void."

It was held that this inhibition was against the creation of an indebtedness or the debt of the municipality beyond the limit therein prescribed. But it

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was held that the compensation of the contractor was not a debt within the sense of this provision, until the service was performed and the contractor was entitled to be paid, and in that view it did not run the debt beyond the constitutional limit. The pivotal point on which the decision turned was the word "indebted," as used in the constitution. The next case cited is *Crowder v. Town of Sullivan*, 128 Ind. 486 (13 L. R. A. 647), which simply reaffirms the same principle. The next case is *Foland v. Town of Frankton*, 142 Ind. 546. That case simply reaffirmed and applied the same principle declared in the two previous cases. In this latter case, it was sought to enjoin the letting of a contract by the town by which it was to pay \$300 a year for a certain number of street lights for a period of five years, and it was averred that no petition had been signed by a majority of the resident owners of the taxable real estate of said town to contract said debt for lighting the streets, or any debt. It was claimed that such a contract would be in violation of section 27 of the act of 1853, reading as follows: "No incorporated town under this act shall have power to borrow money or incur any debt or liability unless a majority of the resident owners of the taxable real estate of said town shall petition the board of trustees to contract such debt or loan." R. S. 1894 (R. S. 1881, section 3342).

It was justly held in the case last referred to that it was a debt or loan only that was prohibited without a petition, and following the two former cases that the agreement to pay for the lights to be furnished did not create a debt within the meaning of the section quoted.

But here we have a very different prohibitory provision to deal with.

The exclusive law making power of the State,

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speaking of the powers of the executive departments of the city government of appellant, of which the board of public works is one, has said: "No executive department, officer or employe thereof shall have power to bind such city by contract, agreement, or in any way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of such department, and all contracts and agreements, express or implied, and all obligations of any and every sort beyond such existing appropriations, are declared to be absolutely void."

Appellee's learned counsel gravely urge that this prohibition is against the creation of a debt or an indebtedness according to the definition given that term in the cases cited and does not prohibit the creation of other obligations. But if this court may fritter away the plain language of the statute in that way, it is poorly worth the while to have another law-making power called a legislature.

To do as counsel gravely urge us to do, would be to usurp the power, to both make and unmake laws. If the judiciary may do that, a legislature would be an appendage to government neither useful nor ornamental. The language quoted deprives the board of public works of the power to bind the city by any contract, agreement or in any way, and to any extent beyond the amount of money already appropriated by ordinance for the purpose of such department, and all contracts, express or implied, and all obligations of any and every sort beyond such existing appropriations are declared to be absolutely void. If language could be so framed as to make such a contract absolutely void, this language has certainly accomplished that result. If it has not, then it is because the English language is utterly incapable of conveying that idea to the understanding. But it is earnestly in-

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sisted that this court, in construing the above language, ought to presume that the legislature employed it with the full knowledge of the decisions in the Valparaiso case and the Sullivan case, and that they supposed from those decisions that the language they employed, above quoted, would mean indebtedness in the sense ascribed to that term in those cases. There would be much plausibility, and even force, in the contention if the word debt or indebtedness had been used in the provision now under consideration. But no such word is used, but the language employed is so broad and sweeping as to carry down obligations of all kinds.

It may be conceded that the presumption arises that the language in question was employed in view of the holding in those cases.

But that concession militates against counsel's contention. The extraordinary strength of the language employed doubled, trebled and quadrupled as it is, to avoid such a construction as is contended for, seems to point with unerring certainty to the fact that the legislature meant just what it has said.

Similar statutory regulations for city governments are not new. Such statutory restrictions very much like those now before us have been enacted in the States of Minnesota, Illinois, Pennsylvania, California, Ohio, Michigan and Oregon, and such statutes have received by the courts of those states the same construction we have placed upon the statute here involved. *Kiichli v. City of Minneapolis* (Sup. Ct. Minn.), 59 N. W. Rep. 1088; *Garrison v. Chicago and Peoples Gas Light and Coke Co.*, 7 Biss. 480; *City of Superior v. Norton* (U. S. Cir. Ct. of App.), 63 Fed. Rep. 357; *Bladen v. Philadelphia*, 60 Pa. St. 464; *City of Philadelphia v. Flanigen*, 47 Pa. St. 21; *Jonas v. City of Cincinnati*, 18 Ohio 318; *Wallace v. San Jose*, 29 Cal.

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180; *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641; *Niles Water Works v. Niles*, 59 Mich. 311; *Pullman v. Mayor N. Y., etc.*, 49 Barb. 57.

It is contended by appellant that there are two lines of decisions on the question before us, one supporting appellant's contention and the other supporting appellee's contention. But we do not so understand the cases. The ones that are in point at all are against appellee's contention and support appellant's contention.

There are cases in other States, like the Indiana cases cited by appellee above mentioned, but we do not think they or the Indiana cases have any application to this case.

The learned counsel for appellee concede that there can be no enforcement of this contract until there is an appropriation of the revenues for that specific purpose, contending that whenever such appropriations are made the contract lays hold on them and their payment may be enforced by action. This is a concession that if no appropriation is ever made therefor, the contract can never be enforced. That amounts to a concession that when made it was not a contract. Because contracts when validly executed do not depend for their validity on the subsequent assent of one or both of the contracting parties. If validly made, it received the assent of both parties in its execution and may be enforced against either party when he is derelict without again obtaining his assent. 1 Pars. Cont. (5 ed.) 475; *Cartmel v. Newton*, 79 Ind. 1.

If the contract is as appellee's learned counsel concede, ineffective, it is because it is made in violation of the statute. Such a contract is absolutely void, and is as if it had never been made. *State Bank v. Coquillard*, 6 Ind. 232; *Cassaday v. American Ins. Co.*, 72 Ind. 95; *Davis v. Barger*, 57 Ind. 54; *Reynolds v. Steven-*

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son, 4 Ind. 619; *Link v. Clemmens*, 7 Blackf. 479; *Pate v. Wright*, 30 Ind. 476; *Heller v. Crawford*, 37 Ind. 279; *Heavenridge v. Mondy*, 34 Ind. 28; *Case v. Johnson*, 91 Ind. 477; 15 Am. and Eng. Ency. of Law, sections 1102–1103.

If the contract had never been made, a subsequent appropriation could not have the effect of making it a contract; the contract being illegal was incapable of being subsequently ratified so as to make it binding without making it a new contract. *Henry v. Heeb*, 114 Ind. 275, and authorities there cited.

All persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation and of its officers to make the contract. 15 Am. and Eng. Ency. of Law, section 1100, and cases there cited; *Union School Tp. v. First Nat'l Bank*, 102 Ind. 464; *City of Detroit v. Robinson*, 38 Mich. 108; 2 Beach Pub. Corp., section 1228, note 5; *Borough of Milford v. Milford Water Co.*, 124 Pa. St. 610 (3 L. R. A. 122); 1 Dillon Munic. Corp., sections 447–8, 457; *Pine Civil Tp. v. Huber Mfg. Co.*, 83 Ind. 121.

We are, therefore, of the opinion that the complaint did not state facts sufficient to constitute a cause of action, and that the superior court erred in overruling the demurrer thereto.

The judgment is reversed and the cause remanded, with instructions to sustain the demurrer to the complaint.

Filed February 18, 1896.

NOTE.—On the question as to what constitutes an indebtedness within the restrictions on municipal debts, the authorities are presented in a note to *Beard v. Hopkinsville* (Ky.), 23 L. R. A. 402.

Wenning et al. v. Teeple et al.

No. 17,078.

WENNING ET AL. v. TEEPLE ET AL.

APPELLATE PROCEDURE.—Instructions.—Reversal of Judgment.—A judgment may be reversed for instructions which would not have been correct under any evidence, although the evidence is not in the record.

BILL OF EXCEPTIONS.—Filing.—Record.—A purported bill of exceptions cannot be considered on appeal, where the record does not show that it was ever filed in the court below.

INSTRUCTIONS TO JURY.—Erroneous.—When Not Cured.—An erroneous instruction is not cured by another instruction correctly stating the law, where the first instruction is not withdrawn from the jury.

EVIDENCE.—Burden of Proof.—Impeachment of Marriage.—The burden is upon a party seeking to impeach a marriage by proof of a former marriage of one of the parties to prove that the former marriage has not been legally dissolved.

WILL.—From Husband to Wife.—Reputed Wife a Married Woman at Time of Second Marriage.—If a husband make provision in his will for his reputed wife, the fact that his reputed wife, at the time of her marriage to him, had a husband living from whom she had not been divorced will not avoid the will as to such wife.

PLEADING.—Complaint.—Action to Set Aside a Will.—A complaint, in an action to set aside a will, averring generally “that said will was unduly executed,” is sufficient on demurrer, notwithstanding the fact that it is followed by facts which are insufficient to avoid the will.

From the Owen Circuit Court.

D. E. Beem and W. Hickam, for appellants.

I. H. Fowler and W. A. Pickens, for appellees.

MONKS, J.—This was a proceeding to contest and set aside the last will of John Wenning, deceased, and the probate thereof, instituted by appellees against appellants.

144	189
142	679
143	578
145	217
147	223

144	189
148	109
149	559
150	164
151	253
151	500

144	189
153	647

144	189
154	587
156	486
156	594

144	189
157	515

144	189
160	574

144	189
164	196

144	189
168	622

144	189
169	78

144	189
171	603

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It is alleged in the complaint "that appellees and Jane Shreese were the only heirs of and entitled to inherit the estate of John Wenning at the time of his death, September 26, 1892; that a certain instrument in writing, purporting to be his last will and testament, had been admitted to probate; that Mary Thalle (known as Mary Wenning) and Charles E. M. McCreary are made the sole legatees and devisees, and are given thereby the whole of the estate of said deceased, of the value of \$10,000, to the entire exclusion of said appellees and Jane Shreese, who are the children of the deceased and entitled to the whole of his estate; that said pretended will is invalid for the following reasons: That said will was unduly executed. And appellees say that said appellant, Mary Thalle (known as Mary Wenning), is claiming and asserting that she was, at the time of the death of John Wenning, his lawful wife by virtue of a pretended marriage, entered into between her and said John Wenning, at said county of Owen, on the 16th day of April, 1884; that at the time of said pretended marriage of said Mary to said John Wenning, she, the said Mary Thalle (known as Mary Wenning), was married to and was the lawful wife of one Herman Thalle, having married him on November 27, 1883, in the territory of Dakota, in accordance with the laws of said territory in force at the time of said marriage; that at the time of the pretended marriage of said appellant, Mary Thalle (known as Mary Wenning), to John Wenning, her said husband, Herman Thalle, was living, and no divorce had ever been granted dissolving said marriage to said Herman Thalle; that said Mary Thalle (known as Mary Wenning), abandoned her said husband, said Herman Thalle, in North Dakota, April 1, 1884, and came to Owen county, Indiana, where she has remained ever since said abandonment,

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and pretended to be married to said John Wenning on the 16th day of April, 1884, without said marriage to said Herman Thalle in any manner having been dissolved." The complaint sets forth the will in controversy, and also the laws of Dakota concerning marriage and divorce.

A demurrer to the complaint, for want of facts, was overruled. The cause was tried by jury and a verdict returned in favor of appellees, and over a motion for a new trial, judgment was rendered setting aside said will. The only errors urged call in question the sufficiency of the complaint and the action of the court in overruling the motion for a new trial.

Appellants admit that it is sufficient, under the decisions of the court, to allege the cause of contest in the language of the statute, but insist that as the allegations which follow the averment "that said will was unduly executed" constitute the charges of fraud or undue influence relied upon, and that the court should apply the law to these specific allegations, and if these are insufficient a demurrer to the complaint should be sustained.

If the allegations referred to are to control the general averment of undue influence, and are intended to be a specific statement of facts constituting such undue influence, then a demurrer to the complaint should have been sustained.

The mere fact that Mary A. Wenning was married to one Thalle at the time she was married to Wenning, on the 16th day of April, 1894, and that she had never been divorced from Thalle would not be sufficient ground for avoiding the will. Schouler Wills, sections 224, 238, 239. It would be proper to prove such facts, if they exist, at the trial of the cause, under the general allegation that the will was unduly executed,

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but, if proven, they alone would not establish the allegation of undue execution.

We think, however, that said allegations concerning the marriage of appellant, Mary A. Wenning, and her not being divorced, and the laws of Dakota are not stated in such a manner as to limit or control the general averment that the will was unduly executed. Such allegations are mere surplusage and could have been stricken out on motion. If, however, the same had been stated with other allegations in such a way as to show that the execution of the will had been procured by fraud or duress, or had been unduly executed for any other reason, it would be proper to overrule a motion to strike out such allegations. The complaint containing the general allegation that the will was unduly executed was sufficient to withstand the demurrer. *Kenworthy v. Williams*, 5 Ind. 375; *Reed v. Watson*, 27 Ind. 443; *Bowman v. Phillips*, 47 Ind. 341; *McDonald v. McDonald*, 142 Ind. 55.

Appellees earnestly insist that what purports to be a bill of exceptions containing the evidence is not a part of the record, for the reason that it was never filed, and that, therefore, no question is presented by the motion for a new trial. There is nothing in the record showing that what purports to be a bill of exceptions containing the evidence was ever filed in the court below.

It is well settled that a bill of exceptions, although signed by the judge, is not a part of the record until it is filed. *Downey v. Head*, 138 Ind. 503, and cases cited; *Ayres v. Armstrong*, 142 Ind. 263; *Elliott App. Proceed.*, section 805, and cases cited. Under these authorities the evidence is not in the record and cannot be considered in the determination of this cause. It does not follow, however, that

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all the causes specified for a new trial will fail for this reason.

It is assigned as a cause for a new trial that the court erred in giving instruction 10 to the jury of its own motion, and also that the court erred in giving instruction 17 asked by the appellees. These instructions are in regard to the presumptions and burden of proof as to the marriage to Thalle and the dissolution thereof, and as to the legality of the marriage to Wenning.

It is settled law in this State that when a marriage has been consummated in accordance with the forms of law it is presumed that no legal impediments existed to the parties entering into such marriage, and the fact, if shown, that either or both of the parties have been previously married, and that such wife or husband of the first marriage is still living, does not destroy the *prima facie* legality of the last marriage. The presumption in such a case is that the former marriage has been legally dissolved and the burden that it has not rests upon the party seeking to impeach the last marriage. *Boulden v. McIntire*, 119 Ind. 574; *Teter v. Teter*, 101 Ind. 129; *Yates v. Houston*, 3 Tex. 433; *Dixon v. People*, 18 Mich. 84; *Harris v. Harris*, 8 Ill. App. 57; *Town of Greensborough v. Underhill*, 12 Vt. 604; *Rex v. Inhab. of Twining*, 2 B. & Ald. 386; *Squire v. State*, 46 Ind. 459; *Klein v. Laudman*, 29 Mo. 259; 1 Bishop Marriage and Divorce, section 457.

In instruction 17 asked by appellee, it is stated that if appellant was legally married to Thalle, "then if the jury find from the evidence that said marriage had never been legally dissolved or annulled by death or decree of divorce, or otherwise, the burden of proof was on the appellee, Mary Thalle, to show by a pre-

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ponderance of the evidence that said marriage had been legally dissolved."

This was clearly erroneous. Appellant, under law as heretofore stated, was not required to prove that she had been divorced from Thalle. The burden of proving that the marriage had not been dissolved by a court or the death of Thalle, was upon the appellees. If the evidence as to this question was evenly balanced or did not preponderate in favor of appellees, then the jury must consider and determine the case upon the presumption that she was not the wife of Thalle in April, 1884, when it is alleged in the complaint that she was married to Wenning.

In instruction 10 the court informed the jury, referring to the marriage of Thalle to appellant, Mary Wenning, "that when a marriage is once established it is presumed to exist during the life of the parties or until it is shown by the evidence that it has been dissolved in some one of the ways known to the law." No such presumption existed in this case. On the contrary, the presumption was that Thalle was dead or divorced, and that there was no impediment to the marriage to Wenning. *Boulder v. McIntire, supra.*

It is true that when the evidence is not in the record instructions will not be held erroneous, if they would be correct under any evidence that could be given under the issues. *Rapp v. Kester*, 125 Ind. 79, and cases cited on p. 82.

The instructions 10 and 17 given in this case would not have been correct under any evidence that might have been given under the issues, and for this reason the cause must be reversed. *Rapp v. Kester, supra*, and cases cited on p. 82; *Lindley v. Dempsey*, 45 Ind. 246.

It is claimed, however, by appellees, that these instructions, if erroneous, were corrected by another

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which correctly stated the law. If such an instruction was given it would not cure the error. This could only be done by plainly withdrawing the instructions named from the jury, which was not done in this case. *State, ex rel., v. Sutton*, 99 Ind. 300, and cases cited (307); *Bitting v. Ten Eyck*, 82 Ind. 421; *Toledo, etc., R. W. Co. v. Shuckman, Admr.*, 50 Ind. 42; *McCrary v. Anderson*, 103 Ind. 12; *Lower v. Franks*, 115 Ind. 334.

Besides, if two or more instructions are inconsistent and calculated to mislead the jury or leave them in doubt as to the law, it is a cause for reversal. *Bitting v. Ten Eyck, supra*; *Somers v. Pumphrey*, 24 Ind. 231 (237); *Summerlot v. Hamilton*, 121 Ind. 87 (90); *State, ex rel., v. Sutton, supra*, and cases cited on p. 307.

There are many other questions discussed in the briefs of the able and learned counsel for appellant, and appellees, but the same either depend on the evidence, which is not in the record, or are such as may not arise at another trial, and are therefore, not considered.

Judgment reversed, with instruction to sustain appellants' motion for a new trial, and for further proceedings not inconsistent with this opinion.

Jordan, J., did not participate in the decision of this cause.

Filed October 16, 1895; petition for rehearing overruled February 13, 1896.

Harless v. Harless et al.

No. 17,766.

HARLESS v. HARLESS ET AL.

APPELLATE PROCEDURE.—Evidence.—Objection.—An objection to an answer responsive to the question asked by the party objecting, is not available on appeal.

EVIDENCE.—Attorney and Client.—That a witness has been attorney for a party does not disqualify him to testify as to statements or declarations of the latter, which are not confidential communications made in the course of professional business, under section 505, R. S. 1894.

SAME.—Declarations of Agent Adverse to Principal.—The declarations of an agent against the interest of his principal, are not inadmissible against the latter because the agent is joined as an adverse party in the action.

SAME.—Motion to Strike Out.—When Properly Overruled.—A motion to strike out all of a witness' testimony is properly overruled, if some part of it is admissible.

From the Madison Circuit Court.

Diven & McMahan, for appellant.

F. P. Foster, for appellees.

MCCABE, J.—The appellant sued the appellees in a complaint of two paragraphs to quiet her title to certain real estate in Madison County.

The issues formed upon the complaint and a cross-complaint were tried by the court, resulting in a finding and judgment for the defendants over a motion for a new trial.

Overruling the motion for a new trial is the only error assigned here. The errors complained of in the motion for a new trial are that the finding is contrary to law and the evidence, and is not sustained by sufficient evidence, and that the court erred in "permitting Henry C. Ryan, a witness for the defendant, to

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testify, over objection of plaintiff, as to a conversation he had with Adam Harless * * * in the absence of the plaintiff, and while said — Ryan was attorney for said Harless and considering matters and things about which he was consulted as an attorney by said Harless.”

The appellant was the holder of a tax deed to the land in controversy, she being the wife of Adam Harless. The sole object of the suit was to enforce the lien in her favor for the taxes for which the land had been sold and subsequent taxes paid by her while she held the tax certificate and deed, the tax title being confessedly invalid.

The land was owned by one Wesley Harless, a brother of appellant's husband, Adam Harless; Wesley had been adjudged a person of unsound mind by said circuit court. Wesley's estate in the land was for and during his life, with remainder over to his children or the survivors of them. He had been married and divorced, having three children by the marriage, one of which only survives; that was Evans Harless, an infant defendant in this action. In the divorce proceedings there was a judgment for alimony against Wesley, upon which his interest in the land was sold to his divorced wife, and she having assigned the certificate to the defendant, Daniel P. Bricker, and the land not having been redeemed at the expiration of one year from said sheriff sale, a sheriff's deed was executed to said Bricker.

The only controversy here is whether the evidence justified the court in finding against the plaintiff as to the existence of her claim and lien for taxes. There is no dispute about the fact that she held a tax title, and that it was invalid, and that she had paid subsequent taxes on the land.

But the theory of the defense as to such lien for

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taxes is that appellant had possession, and the rents, issues and profits for several years, which were more than all that was due her on account of such taxes, penalty, interest and cost.

On the other hand, it is claimed on her behalf, that she was not in possession and did not receive any of the rents, issues and profits at all. The report of the evidence by the official stenographer, as incorporated in the bill of exceptions, is very imperfect and very much confused. The decree assumes to declare a deed by Wesley to Andrew M. Harless, son of appellant and Adam Harless, void, and a mortgage by said Wesley to one Samuel Harless void, which are not embraced in the evidence. But no question is made about these instruments. Andrew M. Harless was single, and only about twenty years of age when his mother got her tax title, and lived with his parents. The appellant testified that he, her son, had a deed for the land and took the rents, and that she did not get any of them.

But there was evidence from which the court might have reasonably and logically inferred that it had been agreed that Andrew M. was to apply the rents to the payment of his mother's tax lien, and that he and his father, Adam, received more than enough to discharge the same, and that his said father, husband of the appellant, acted as her agent in the matter.

The following question by the appellees to their witness was asked: "State, Mr. Ryan, what was said and done there? A. Well, as I stated, Wesley Harless and Adam Harless came there (to his office), and I am not sure, but I think Andrew M. Harless, the grantee of the deed, they came there for the purpose of fixing up the title to the land. They agreed between themselves there that the land was to be deeded, as I remember, to Andrew M. Harless, and there was to be a writ-

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ten contract made between Wesley Harless and either Adam or the wife, Mrs. Elizabeth Harless, I don't remember which, by which they were to take the land and out of the proceeds of the farm reimburse Mrs. Elizabeth Harless." In answer to another question the same witness stated: "The land was conveyed to Andrew M. Harless, with the understanding that the income and profits arising from the farm would be applied for payment of the taxes to reimburse Elizabeth Harless and to pay the accruing taxes."

There was other evidence from which it might have been fairly inferred that the appellant consented to this arrangement and either got the rents from her son or allowed him to keep them as a gift. Such rents are shown to be of much greater value than the appellant's claim for taxes.

It is true the appellant denies in her testimony that she ever had possession or received any of the rents. But we cannot weigh conflicting evidence and determine where the preponderance is. Aside from the testimony of appellant and her husband, there is sufficient evidence to warrant the court in drawing the inference that the rents passed under appellant's control in an amount more than sufficient to pay her claim for taxes.

The foregoing conversation detailed by the witness Ryan, was objected to by the plaintiff's attorney as follows: "We object to it on the part of Adam Harless because he is made a defendant here. * *

"We further object on the part of the plaintiff, because Mrs. Harless wasn't present."

"Court. Do you know for whom Mr. Adam Harless was acting in that matter? A. Adam acted for his wife in all of these matters as far as that is concerned.

"Q. Was he acting at that time for his wife? A. My

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impression is, my recollection is, he was; he was buying this certificate (the certificate of tax sale) for her."

There was no available error in overruling the objection on the ground that Adam was a defendant. These were not self-serving declarations. It was but evidence of a contract made between Wesley, Andrew M. and Adam Harless for the benefit of Elizabeth Harless, Adam's wife, not binding on her unless her husband was authorized to act for her, or unless she afterwards ratified his acts.

On cross-examination the witness Ryan was asked: "Who did you learn it from?" (that he was acting for his wife). He answered: "If I learned it I learned it from the parties there."

Appellant's attorney then said: "I object, it isn't competent to prove agency; Mrs. Harless wasn't there."

To say the least of it, this objection is so indefinite as to render it impossible for the trial court to know what to do with it. It was an objection to the answer of the witness to a question put to the witness by the objector. The answer was responsive to the question, and was much more intelligible than the objection. It does not lie in the mouth of a party to object to an answer which he himself calls for.

Before the witness proceeded to state what had occurred in his office between Wesley, Andrew M. and Adam Harless, the plaintiff's counsel asked him certain questions, which, together with his answers, are as follows: "But were you acting for Adam Harless? A. Well, I don't know hardly how to explain that; they came there to make a transaction, or to make some disposition of this real estate."

"Q. Hadn't you been Adam Harless' attorney in

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litigation before this? A. I had been his attorney, that is, in other litigations."

"Q. With reference to this same matter, had you not been his attorney? A. I think it is possible. Adam Harless talked to me about the purchase of the tax certificate * * * either on that day or other days. I suppose it was talked of, though, on that day." Now these questions were asked by the plaintiff's attorney, and their answers were objected to by her attorney on behalf of Adam Harless because Adam was made a defendant, and on the part of the plaintiff because Mrs. Harless was not present.

These objections fall under the same condemnation to which those already mentioned are subject.

The questions were asked by the objector, the answers were responsive to the questions put to the witness.

If the learned counsel did not desire answers to the questions, he should have refrained from asking them, or have withdrawn them. The objection did not admonish the court of any misstep it had taken so as to correct it. In fact, the court had had nothing whatever to do with the production of the answers to which objection was made. That was wholly owing to the fault of appellant's counsel. If these answers, in the opinion of counsel, revealed that any part of the testimony of the witness was incompetent, and which had not before appeared in his testimony, the proper remedy was to move to strike out such parts of his testimony as were thus shown to be incompetent.

Counsel afterward did make a motion to strike out as follows: "I now move to strike out all the gentleman's testimony in the matter for the reason it is sought to charge plaintiff in her absence that her presence had no connection with it; and witness de-

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tails conversations had while acting as attorney for Adam Harless."

This last objection is very vague and indefinite. The fact that the relation of attorney and client has once existed between a witness and a party does not disqualify such witness to testify as to the statements or declarations of such party, so long as it is not proposed to prove by such witness confidential communications made to such witness in the course of his professional business. Burns R. S. 1894, section 505, (R. S. 1881, section 497) and cases there cited. Besides, there is no communication made to the witness by Adam Harless, whether confidential or otherwise, that is testified to by such witness.

The court rightly overruled this motion, if it be conceded that certain parts of the witness' testimony were subject to the objections made because there were parts of his testimony to which such objections did not apply at all; for instance, that part relating to the agreement made between Wesley, Andrew M. and Adam Harless there that day, the motion asked the court to strike out all the testimony of the witness.

The court did not err in overruling the motion for a new trial.

Judgment affirmed, but we do not mean to affirm the judgment for \$300 in favor of the guardian *ad litem* against the infant defendant, Evan Harless, or to recognize its validity by this decision.

Filed October 16, 1895 ; petition for rehearing overruled February 14, 1896.

Mackey v. Craig, Administrator.

17,207.

MACKEY v. CRAIG, ADMINISTRATOR.

PLEADING.—*Complaint for Recovery of Purchase-price of Land.*—

Vendor's Lien.—A complaint alleging a sale of land by plaintiff's intestate, in payment for which defendant drew his check payable to a given bank for the benefit of such intestate, and that such check was properly presented for payment, and was and still is due and unpaid, and asking for judgment against defendant, and that such judgment be declared a specific lien on the land, and that the land be sold in satisfaction, states a good cause of action to recover the purchase-price of land, and to have the same declared a vendor's lien on the land.

CHECK.—*Equitable Owner.*—The fact that a check is made payable to a bank, and is not endorsed by it, does not prevent a third person from being the equitable owner thereof.

VENDOR'S LIEN.—*Action to Foreclose, Where Brought.*—An action to foreclose a vendor's lien is properly brought, under section 808, R. S. 1894, in the county where the land is situated.

From the Decatur Circuit Court.

Iglehart & Taylor and J. D. Miller, for appellant.

Ewing & Wilson, for appellee.

HOWARD, J.—It is assigned as error that a demurrer was overruled to the first paragraph of appellee's complaint, and also that a demurrer was sustained to appellant's plea in abatement.

The material allegations of the first paragraph of the complaint are, that appellee's decedent, his wife joining, sold and conveyed to appellant certain described land in Decatur county; that in payment of the purchase money for said land the appellant drew his check on the old National Bank of Evansville, for the sum of \$6,000, payable to the order of the First National Bank of Greensburg, in said county, which

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check, it is alleged, was drawn for the benefit of said decedent and was his property, and is the property of the appellee as his administrator; that the said check was properly presented for payment, and payment thereof refused, of which the appellant had full notice; that the same is due and unpaid, and there is an unreasonable delay in its payment.

The prayer is for judgment against appellant, and that such judgment be declared a specific lien upon said real estate, and that the land be sold in satisfaction thereof.

The defect which appellant insists is found in the complaint. is that it appears therefrom that the check was made payable to the First National Bank of Greensburg, while it does not appear that the check was ever endorsed or assigned to the decedent or to the appellee.

It is, however, alleged that the check is the property of the appellee, and that it was drawn for his decedent in payment of the purchase-price of said land. The bank, also, was made a party to assert any claim which it might have upon the check. Certainly, the decedent might be the equitable owner of the check, even though, for some reason which does not appear, it was made payable to the bank. 1 Am. and Eng. Ency. of Law, 835, and authorities there cited. If the complaint were not sufficiently specific in this respect, it might be made so on motion.

In any event, the pleading is substantially a complaint to recover the purchase-price of real estate sold and conveyed, and to have the same declared a vendor's lien upon the land. Appellant has advanced no good reason and cites no authority to show its insufficiency as such, and we perceive none.

The answer in abatement filed by the defendant, Mackey, is based upon the averment that he is now, and was at the date of the bringing of this action, a

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resident of Vanderburgh county, and not of Decatur county. The action, however, was for the recovery of an interest in real estate, and the action was therefore properly brought in Decatur county, where the land is situated. Section 308, R. S. 1894 (section 307, R. S. 1881). *Urmston v. Evans*, 138 Ind. 285; *Parker v. McAllister*, 14 Ind. 12; *McCaslin v. State, ex rel.*, 44 Ind. 151; *Huffman v. Cauble*, 86 Ind. 591; *Dowden v. State*, 106 Ind. 157. See further note to section 307, R. S. 1881, Thornton's Indiana Prac. Code. The court did not err in sustaining the demurrer to the plea in abatement.

The judgment is affirmed.

Filed March 5, 1896.

No. 17,802.

BIG CREEK STONE CO. ET AL. v. SEWARD ET AL.

RECEIVER.—*Action*.—There is no right of action in creditors of a corporation under receivership to enforce claims due such corporation.

APPELLATE PROCEDURE.—*Complaint and Supplemental Complaint*.

—The complaint and supplemental complaint will be regarded, on appeal, as together constituting the complaint.

SAME.—*Error Apparent in Record*.—*Reversal of Judgment*.—A judgment will be reversed for an error appearing in the record, although such error is not argued by appellant's counsel.

144	205
143	599
144	205
151	41
144	205
156	637
144	205
161	533
162	51
144	205
167	288
167	289
144	205
170	364
170	690

From the Monroe Circuit Court.

J. H. Loudon, W. H. Martin, R. A. Fulk, E. Corr and *T. J. Loudon*, for appellants.

Henley & Wilson and *Duncan & Batman*, for appellees.

HACKNEY, C. J.—The appellees, as judgment creditors of the Big Creek Stone Company, sued said com-

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pany and certain named subscribers to the capital stock. The complaint alleged that the stock subscribers had paid but a small proportion of their subscriptions; that assessments and calls had been made and remained unpaid; that the corporation held no property subject to execution, but was wholly insolvent and in the hands of a receiver; that there were subscribers who had unpaid assessments and calls, the amounts owing from whom the plaintiffs had no knowledge. Discovery as to additional subscribers, the amounts subscribed and the amounts unpaid upon subscriptions, assessments and calls, was prayed and a decree was sought requiring the stock subscribers to pay into court sums sufficient to discharge the indebtedness of the corporation. The circuit court overruled a demurrer to the complaint, and that ruling is assigned as error. The liability of the several stockholders, if any, was upon obligations to the corporation, since there is neither common law nor statutory liability to creditors in the first instance.

It was, therefore, incumbent upon the appellees to allege facts, not only to disclose a liability of the stockholders or stock subscribers to the corporation, but a liability enforceable by the creditor directly.

It is exceedingly doubtful if facts were alleged sufficient to have disclosed a liability to the corporation, since the character and extent of subscriptions by the shareholders named were not alleged and no excuse given for the failure. And, as to the assessments and calls, no facts are stated from which it can be judged whether they were made by an officer, board or other authority possessing power to make them, or whether they were made pursuant to statutory power or corporate rule or by-law. If the complaint were on behalf of the corporation, its allegations would be exceedingly meager and unsatisfactory, if not wholly

bad. However, a more serious objection to the pleading is that when it discloses a receiver for the corporation, an officer representing the creditors, the fact is manifest that no cause of action exists against the shareholders in the name of creditors. As we have seen the obligation is owing to the corporation, it is as assets of the corporation to be gathered in by the receiver, and, when added to other available assets, applied, not upon the debt of some creditor or creditors whom he may prefer, but *pro rata* among all of the creditors, unless there is some legal or equitable preference by reason of existing liens. It is not the policy of the law that creditors, singly or collectively, may ignore the receiver's possession of corporate assets and his right and duty to protect and preserve them for disposition as the court appointing may direct. If such were the policy, the property might easily be dissipated, some creditors gain advantage over others, the objects for which the receiver is appointed would be frustrated and the authority of the court defeated. In a suit by creditors to set aside, as fraudulent, the incumbrances of corporate property and to subject the property to the claims of such creditors, it was held by this court, in *Nat'l State Bank, etc., v. Vigo Co. Nat'l Bank, etc.*, 141 Ind. 352, that the right was vested in the receiver of the corporation and that the complaint of the creditors, for that reason, was bad. In *Voorhes v. Carpenter*, 127 Ind. 300; and *Hutchinson v. First Nat'l Bank, etc.*, 133 Ind. 271, this court held that the assignee of an insolvent corporation and not the creditor was the proper party to maintain actions, the object of which is to reach assets for the payment of the debts of the corporation.

In *Wheeler v. Thayer*, 121 Ind. 64, a creditor sought to enforce against subscribers to and holders of cor-

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porate stock, to the extent of his credit, a claim for the unpaid balance owing upon such corporate stock. It was there said: "It is quite clear that the appellant has no right of action against the appellees. If they owe the corporation anything on account of stock subscriptions, a receiver should be appointed to settle up the affairs of the corporation, who may enforce collections and by due course of law settle up its affairs. It is true the appellant avers that he is the only creditor, and this may be, so far as he knows, but other creditors may turn up, and if so they ought to have an opportunity to file their claims, as they would have a right to do if a receiver is appointed." We need not go to the extreme limits of that holding, since it affirmatively appears in the present case that a receiver has been appointed and is acting. Nor do we go to the extent of holding that where a receiver fails and refuses to press such a claim against stockholders, he alone, or in connection with stockholders, may not, with the consent of the appointing court, be sued by a creditor or creditors for the benefit of the creditors' claim. In the present case there was no allegation of the receiver's refusal, and he was not made a party. The complaint was not sufficient, and the judgment of the lower court is reversed, with instructions to sustain the demurrer of the appellee to the complaint.

Filed December 18, 1895.

ON PETITION FOR REHEARING.

HACKNEY, C. J.—Originally we considered the complaint and supplemental complaint as one pleading, while the facts stated by us appeared from both. On the theory that they did not constitute one pleading, counsel ask a rehearing and question the

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statement of facts upon which our opinion rested. The complaint and the supplemental complaint are to be considered together as constituting the statement of the plaintiff's cause of action as if all of the facts stated in both were embodied in a single pleading. Together they constitute the complaint. *Pouder v. Tate*, 132 Ind. 327; *Wayne Pike Co. v. Hammons*, 129 Ind. 368; *Peters v. Banta*, 120 Ind. 416; *Simmons v. Lindley* 108 Ind. 297; *Lewis v. Rowland*, 131 Ind. 37.

Complaint is made by counsel that the sufficiency of the pleading was determined upon a question not argued by counsel for appellant, and which question was, therefore, waived.

The correctness of the rule upon which our decision was based is not questioned by counsel, and, in our opinion, is beyond dispute. It may be inquired, therefore, should the court be controlled by a rule which would estop counsel and parties to the extent that it should hold sufficient a state of facts which plainly disclosed that no cause of action existed? Most certainly not. While we are not obliged to search for errors not made manifest by the record as the appellant brings it to us, we are not so restricted by that rule that we are required to hold a pleading sufficient when it is clearly insufficient, and when to do so would create a precedent well calculated to mislead the profession and lend confusion to well settled principles of pleading and practice. When an error is presented by the record, the case is decided upon the record and not upon the argument of counsel, but, when a question is not argued and does not occur to the court in its investigations of the record, a rehearing will not be granted to permit a discussion of such question. *Martin v. Martin*, 74 Ind. 207. In this case the sufficiency of the complaint was duly presented, and it was pal-

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pably bad. To have held it otherwise would have been a perversion of justice. If the court were limited to the arguments and reasoning of counsel in its decisions of cases, to the exclusion of its own observations, many cases would lead us far from what we understand to be the true object of the court.

The petition is overruled.

Filed March 5, 1896.

No. 17,685.

WRIGHT v. THE STATE.

APPELLATE PROCEDURE.—*Weight of Evidence.*—A conviction will not be reversed on appeal on the ground that it is against the weight of the evidence.

CRIMINAL LAW.—*Affidavit and Information.*—An information need not state that it was filed when the grand jury was not in session, nor that it had been discharged, under section 1802, R. S. 1894, providing that the information need not show the reasons for not prosecuting by indictment.

From the Kosciusko Circuit Court.

H. R. Robbins, for appellant.

W. A. Ketcham, Attorney-General, for State.

HACKNEY, C. J.—The appellant was charged by affidavit and information, tried and convicted of the crime of burglary. The action of the circuit court in overruling a motion to quash the information and in overruling a motion for a new trial are the only causes of error assigned.

The affidavit and information were filed in the circuit court on the fourth day of the first term of that

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court following the appellant's commitment upon a preliminary hearing. The only objection to the information, urged by counsel for the appellant, is that it does not appear to have been filed when the grand jury was not in session or had been discharged. It is supposed that this argument is designed to impress the court that the burden rested upon the appellee, in her charge, to affirmatively disclose the right to prosecute by information, as that right is given by section 1748, R. S. 1894 (1679, R. S. 1881). Unfortunately for this argument the statute, R. S. 1894, section 1802 (R. S. 1881, section 1733), provides that it shall not be necessary to disclose, in the information, the reasons for not prosecuting by indictment. A motion to quash did not, therefore, raise the question here urged. *Nichols v. State*, 127 Ind. 406; *State v. Drake*, 125 Ind. 367; *Keneger v. State*, 120 Ind. 176; Gillett's Crim. Law (2d. ed.), section 121.

The weight and sufficiency of the evidence are the only questions urged upon the motion for a new trial. The theory of the appellant, presented by his counsel, is that two neighbors of appellant's father desired to possess themselves of the father's farm and thereby rid themselves of a neighbor who was objectionable because "a poor man, somewhat uncultured and not at all stylish;" that these two neighbors and about fifty others formed an organization to aid these two neighbors in accomplishing their desire; that in pursuance of a conspiracy between these many neighbors, a detective was employed to induce this appellant to visit the bins of one of the neighbors and steal grain; that, being unable to induce the appellant to do so, they procured another to accompany the detective on the mission suggested, and twenty or more of them having stationed themselves about the neighbor's premises, they saw the detective and the "stool

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pigeon" go through the form of stealing two bags of oats, and then saw them take flight, and that, in further advancement of this wicked conspiracy, the members of this organization came into court and falsely testified that the "stool pigeon" was this appellant. The further theory of the appellant is that the alleged burglary was with the consent of the owner of the property and was, therefore, no crime.

The first of these theories, involving so many people and such extensive perjury, to an end so unimportant, impressed us, while reading it, with the belief that there must be more than a grain of fiction in it. Upon reading carefully the more than three hundred pages of evidence, we are convinced beyond a reasonable doubt that there is hardly a grain in this theory which is not fiction.

Nor is there more truth in the second theory. In the community where the appellant resided there was one of those lawful and often beneficial organizations for the detection of the thieves who plunder the farmers' barns, bins and henneries. It came to one of the members that the appellant had sought one Bolenbaugh to join him in a raid upon the granary of a neighbor named Anglin. This member induced Bolenbaugh to accept the proposal, that the appellant might be brought to justice. On the night when the theft was to be committed, a number of the members secreted themselves upon Anglin's premises, and toward "the witching hour of night" two forms appeared upon the premises in the bright and beautiful moonlight. These forms proceeded to the granary, broke the lock from its door, went in, filled two sacks with oats, placed the sacks upon their shoulders and started from the premises with them. When near the gateway some one of the watchers gave an alarming sound, then the sacks were dropped, the taller took

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flight down the lane and Bolenbaugh across the fence to permit the pursuers to have free chase down the lane. The tall form was fleeter than the pursuers and was soon lost in the paw-paw bushes. Twelve of those who were present on that night, without the slightest doubt, identified the appellant as the possessor of that taller form and those fleeter feet. He was found at his home and arrested at 3 o'clock that night. By some strange chance he had his clothes on when called and did not weary the callers with waiting. The absence of Mr. Anglin from his home on the night in question is the strongest circumstance in the case tending to support the claim that he aided and abetted the pillaging of his garnered harvests.

It is true that the defense offered evidence of an alibi and evidence that one Blue was in company with Bolenbaugh on the evening of the crime. Much of this evidence showed upon its face the marks of fabrication, many of the witnesses were hopelessly impeached, and all of them were stoutly contradicted.

It is thus shown that the question of the appellant's presence and participancy in the crime charged was not only a proper question for the jury, but that the question was, without a reasonable doubt, correctly decided. If it were a doubtful question, it must be well understood that this court has no power to pass upon that doubt, which would clearly depend upon the weight of the evidence.

Finding no error in the record, the judgment of the circuit court is affirmed.

Filed March 5, 1896.

No. 17,819.

LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY CO.

v. PETERSON, BY NEXT FRIEND.

144 214
152 313**SPECIAL VERDICT.—*Railroad.—Rule as to Duty of Brakemen.—***

Conclusion of Law.—In an action against a railroad company, a special finding as to the existence of a rule of the company relating to the duties of brakemen, is the statement of a fact upon which the court could determine, as a question of law, whether authority had been given the brakeman to eject a trespasser on the train, and such determination would not infringe any prerogative of the jury.

SAME.—*Railroad.—Authority of Brakeman.*—In such case, if the finding had been that the brakeman had or had not authority to eject the trespasser, such finding would have stated the limit of the issue, both as a question of fact and one of law, and would be objectionable.

EVIDENCE.—*Burden of Proof.—Railroad.—Trespasser.—Authority of Brakeman.*—In an action by a trespasser on a freight train, injured by a brakeman, for damages, the burden is upon the plaintiff to show that the brakeman who inflicted the injury possessed the authority to do the act which resulted in the injury.

RAILROAD.—*Rule.—Brakeman.—Authority to Eject Trespasser.*—Under the following rule of a railway company: "They [brakemen] are under the immediate orders of the conductor or yardmaster with whom they serve, and must give him every assistance in the performance of his duty. They are to ask and receive from him all instructions necessary as to their duties. In general, they are the servants and guardians of the train; to do all the work required during its trip, and protect it from danger,"—freight brakemen are not authorized to eject trespassers generally.

SAME.—*Authority of Brakemen.*—The fact that a conductor and two brakemen were in charge of and managing a train does not carry the inference that the brakemen had the authority co-equal with the conductor, or that they had any authority other than that implied from their position as brakemen.

NEW TRIAL.—*A Cause, if Tried Anew, Must Be on Same Theory.*—A case cannot be tried upon one theory, and, when defeated, obtain a new trial upon a different theory.

L. S. & M. S. Ry. Co. v. Peterson, by Next Friend.

From the Kosciusko Circuit Court.

Baker & Miller, for appellant.

H. C. Dodge, for appellee.

HACKNEY, J.—The appellee sued and recovered against the appellant for personal injuries alleged to have been sustained while being ejected from the appellant's freight train. The complaint disclosed no relation of passenger and carrier and alleged no right or authority in the appellee to go or remain upon the appellant's freight train, but proceeded upon the theory that the appellee was a trespasser. While so upon the train, it was alleged, one George Harris, appellant's rear brakeman on said train, ordered appellee from said train, while the same was running at a rate of speed rendering it dangerous for appellee to get off, and, when the appellee had hesitated and declined to get off, said brakeman pursued him with a bludgeon, cursed him and threatened to kill him; that, in fear of his life, and while excited, the appellee attempted to leave said moving train, when he slipped and fell to the ground and was run over by said train. The allegation of the complaint disclosing the theory that the brakeman, in what he did, was acting in the line of his employment was as follows: "That according to the rules and regulations in force at said time, the brakeman, George Harris, * * was constituted the servant and guardian of the said train * * and as such guardian of such train it was the duty of said George Harris to protect said train from danger during its trip, which it was then entered upon to Chicago, and from trespassers and from the presence of persons upon said train."

The theory of the complaint and that upon which the cause was tried and is here sought to be main-

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tained is that the alleged duty of the brakeman was by the expressed general directions of the appellant.

Upon the trial the parties submitted to the jury certain interrogatories, which were answered and returned with a general verdict in favor of the appellee. The appellant moved for judgment in its favor, notwithstanding the general verdict, and the overruling of that motion presents one of the questions urged for reversal. Such of the interrogatories and answers as may possibly be relevant to the discussion are those of the appellee :

“First: Was Martin Peterson on top of a car of a train of defendant known as Third Number Forty-seven on October 25, 1891? Ans. Yes.

“Second: Is it not true that a brakeman by the name of George Harris ran after Martin Peterson while on top of train Third Number Forty-seven, with a club or stick uplifted and threatened said Peterson, and caused him to be frightened and fall off said train, in which fall said Peterson received the injuries mentioned in the complaint? Ans. Yes.”

Those of the appellant:

“1. Was not plaintiff injured by falling from and being run over by west bound freight train No. 47, Third Section, on defendant’s tracks in Elkhart west of Twelfth street? Ans. Yes.

“2. Was not A. C. Rossiter conductor in charge of train No. 47, 3d section, on the day of plaintiff’s injury? Ans. Yes.

“3. Is not Twelfth street about five hundred feet west of Tenth street in said city of Elkhart? Ans. Yes.

“4. Was not said train 47, third section, standing east of Tenth street just before and at the time it started to pull out of Elkhart? Ans. Yes.

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"5. Did not said train 47, third section, at the time of injury to said plaintiff, consist of an engine at the west end of said train, 36 freight cars, and a caboose at the east end of said train? Ans. Yes.

"8. Was not plaintiff catching on to and riding on said train without the permission of the defendant? Ans. Yes.

"9. Was not plaintiff trespassing on the tracks and train of defendant on the occasion of his injury? Ans. Yes.

"17. Was not the speed of said train at the time plaintiff fell off from four to six miles per hour? Ans. Yes.

"18. Did rear-brakeman Harris drive plaintiff from said train, brandishing a club and using the language set out in the complaint? Ans. Yes.

"19. At and before the time of plaintiff's injury, were not the following rules regarding brakemen in force, which had been promulgated by defendant:

" 'OF BRAKEMAN.

" '96. On entering the service of this company they each procure a copy of the general rules on the time table and of these rules, and make themselves acquainted with them. They must then present themselves for examination by the Superintendent, who is charged not to accept any person not vouched for as of good morals, sober and industrious. They will be required to sign an acknowledgment as specified in rule 35.

" '97. They are under immediate orders of the conductor or yardmaster with whom they serve, and must give him every assistance in the performance of his duty. They are to ask and receive from him all instructions necessary to their duties.

" 'In general they are the *servants* and *guardians* of

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the train; to do all the work required during its trip and to protect it from danger.

“ ‘98. They should observe at every stop the condition of the journals, wheels, brakes and other parts of the cars, or of their attachments, which are likely to become heated, or to get out of order; and they must report any heating or derangement at once to the conductor.

“ ‘99. They are expected to be orderly, polite and attentive to duty; to try to serve the company well and to deserve promotion. Conductors are instructed to replace men who fall short of these requirements by the employment of others who will fulfill them.

“ ‘100. They are expected to make themselves familiar with the duties of conductors as defined in the general rules of the time table and in this book.

“ ‘101. When employed on a passenger train, except when engaged in other duties, they must remain near the door, standing; unless the seat nearest the door is vacant, when they may sit down, but not otherwise. They must give constant attention to keep the coaches as comfortable, well ventilated and free from dust as circumstances will allow.

“ ‘102. They must provide themselves with warm clothing sufficient to endure the longest exposure in storms and in winter. When on duty they must always have fog signals—torpedoes—in their pockets ready for instant use.

“ ‘103. In applying the brakes they must take care not to slide the wheels, for that destroys the wheels, yet does not retard the train so much as to let the wheels turn slowly in the brakes. In approaching places at which a stop is to be made, they should apply the brakes in time to stop, and releasing them before starting, without any signal from the whistle.

“ ‘104. They are particularly charged to study and

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to understand rule 20 of the general rules upon the time table; for when a train breaks in two they can always prevent damage if they proceed exactly as therein directed, while they will be almost certain to cause destruction if they vary from the directions given.' Ans. Yes.

"20. At and before the time of plaintiff's injury, was rear-brakeman Harris directed by any officer or agent of defendant to put plaintiff off the train upon which he was riding? If so, by what officer or agent? Ans. No.

"21. At and before time of plaintiff's injury, was rear-brakeman Harris in any way directed or instructed by any officer or agent of defendant in regard to letting on, keeping off or ejecting persons from defendant's freight trains other than by rules set out in interrogatory 19? Ans. No."

The effect of the general verdict was to find that the brakeman was authorized by the company, or directed by some one in authority generally, to eject trespassers from the train. There is no question of the rule that the general verdict must stand until the answers to interrogatories are found to be in irreconcilable conflict with it. But counsel for the appellee insists that the answer which is urged to stand in conflict with the general verdict, that is to say, the answer to the nineteenth interrogatory consists of a mere statement of evidence and does not find the ultimate fact which, it is claimed, should have been that the act complained of was or was not within the scope of the brakeman's employment. The only rule of the company, found in the answer in question, which, by any possible construction, could be held to have given the brakeman express authority to eject trespassers was that numbered 97. It is that rule which is urged by the appellee as constituting express authority to

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eject trespassers. In our opinion the existence or non-existence of such authority must depend upon the proper construction of that rule, since we have learned from the answers to the twentieth and twenty-first interrogatories that the brakeman had no general or special directions, as to removing persons from the train, other than those given in the rules included in the answer to the nineteenth interrogatory.

The duties of brakemen as to the carrying of torpedoes, the application of brakes, what should be done in case the train should break in two, as to learning the rules concerning conductors' duties and the rules upon the time table, can have no bearing upon the question of the existence of express power to remove trespassers. Nor can the existence of other and undisclosed rules leave the question in doubt as to whether they contained express authority on the subject, for any such doubt is dispelled by the answers to the twentieth and twenty-first interrogatories. The nineteenth interrogatory and answer, in the light of what we have said, are, as if the jury had stated specially by their verdict: The brakeman, Harris, had only such directions and instructions to eject the plaintiff, or persons generally, as are contained in the following rule of the company as to its brakemen: "97. They are under the immediate orders of the conductor or yard master with whom they serve, and must give him every assistance in the performance of his duty. They are to ask and receive from him all instructions necessary as to their duties. In general, they are the servants and guardians of the train; to do all the work required during its trip and protect it from danger." In our opinion such a finding would involve not simply an item of evidence, but the statement of a fact upon which the court could determine, as a question of law, whether authority had been

given the brakeman as claimed by the plaintiff. The fact so stated involved a question of construction which the court could pass upon without infringing any prerogative of the jury. This conclusion is made manifest by the further conclusion that if the plaintiff or defendant had asked the trial court to give an instruction embodying rule ninety-seven and announcing a construction thereof, the court would have been required to give it and not submit the question of construction to the jury. This conclusion is the necessary result of the rule which makes the construction of all written evidence a question for the court. *Kreigh v. State*, 17 Ind. 495; *Dutch v. Anderson*, 75 Ind. 35; *Turner v. First National Bank*, 78 Ind. 19; *Louthain v. Miller*, 85 Ind. 161; *Dixon v. Duke*, 85 Ind. 434; *Over v. Schiffing*, 102 Ind. 191; *Over v. City of Greenfield*, 107 Ind. 231.

Of the control of the question involved in the inquiry as to the scope of an agency, Judge Elliott has said, in his work on the General Practice, section 426, that "Where the facts are undisputed or the authority is conferred by a writing, the scope of such authority is generally a question of law for the courts," citing *Mobile & O. R. R. Co. v. Thomas*, 42 Ala. 672; *Ludwig v. Gorsuch*, 154 Pa. St. 413 (26 Atl. R. 434); 4 Mo. App. 576; *Loudon Sav. Fund Soc. v. Hagerstown Savings Bank*, 36 Pa. St. 498-502.

If, as appellees' learned counsel insists, the finding had been that the brakeman had or had not authority to eject, such finding would have stated the limit of the issue, both as a question of fact and one of law, and would have been objectionable. *Manning v. Gasharie*, 27 Ind. 399. It would have deprived the court of all privilege of passing upon the fact and would have been as conclusive of inquiry as the gen-

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eral verdict. It would have violated the rule that special findings should not embody statements of conclusions of law or fact as laid down in the case of *Chicago, etc., Ry. Co. v. Burger*, 124 Ind. 275, and the numerous cases there cited. Such conclusions are never permitted unless the fact sought is incapable of statement without involving the question of law; or unless there is no standard by which the legal conclusion can be measured without a statement of the conclusion of fact. *Perkins v. Hayward*, 124 Ind. 445.

In Elliott Gen. Pr., section 931, it is said that "a finding as to the legal effect of a deed or of certain circumstances constituting notice, has been held to be a conclusion of law." *Miller v. Shackelford*, 4 Dana (34 Ky.) 264; Bacon's Abridg. Verdict E.; *Hankey v. Downey*, 3 Ind. App. 325.

There is, therefore, no objection to the form of the interrogatory or the answer thereto as being merely evidentiary.

Upon the question of the conflict between the general verdict and the answers to special interrogatories said to exist, there is little doubt of its importance and controlling influence upon the case. As we understand counsel for appellee, it is not insisted that it is essential to the appellee's recovery that brakemen have implied authority to eject trespassers from the freight trains upon which they are employed, nor that the burden of showing that the act complained of was within the scope of the brakeman's employment rested upon the appellant. However, we take the rule to be free from doubt that the burden rests upon the injured trespasser to show that the brakeman inflicting the injury possessed the authority to do the act which resulted in injury. *Forber v. Mo. Pac. Ry. Co.*, 116 Mo. 81; *Corcoran v. Concord & M. R. Co.*, 56

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Fed. Rep. 1014, (6 C. C. A. 231); *Bess v. Chesapeake, etc., R. R. Co.*, 35 W. Va. 492 (29 Am. St. Rep. 820); *Towanda Coal Co. v. Heeman*, 86 Pa. St. 418; *Texas & P. Ry. Co. v. Moody*, 23 S. W. Rep. 41; *International, etc., Ry. Co. v. Anderson*, 82 Tex. 516 (27 Am. St. Rep. 902); *Marion v. Chicago, etc., Ry. Co.*, 59 Ia. 428; 2 Wood Railroads, p. 1382, section 316. As in conflict with this doctrine, however, the appellee cites the cases of *Hoffman v. New York, etc., R. Co.*, 87 N. Y. 25; *Kansas City, etc., R. Co. v. Kelley*, 36 Kans. 655; *Carter v. Louisville, etc., Ry. Co.*, 98 Ind. 552.

In the first of these cases the plaintiff was a trespasser on a passenger train and was kicked therefrom by the conductor or brakeman. The objection to liability was that the act was not within the scope of the employment of those "in charge of the train." The court held, without attempting to discriminate as between the authority of a conductor and a brakeman, or as between the implied authority of servants upon a passenger train and a freight train, that the act of ejecting the trespasser was, if by a brakeman, within the implied authority of his employment. In the second of the cases cited by the appellee the plaintiff was a trespasser upon a freight train, and was injured while being ejected by a brakeman. The evidence of one of the brakemen on the train was that "I was to keep them off of my end of the train and he was to keep them off of his." Though unnecessary to place the case upon that ground, the court held that implied authority existed in a brakeman to eject trespassers. The Indiana case cited is placed distinctly upon the ground, not of an implied authority in a brakeman to eject, but upon the allegation of the complaint that those who had been put in charge and

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control of the engine to do switching had implied authority to remove trespassers from the engine. The first two of the cases cited by the appellee, if they were adverse to our view, are, as we believe, contrary to the decided weight of authority so far as they may be held to sanction the rule that implied authority is given a freight brakeman to eject trespassers from the train. The case of *Carter v. Louisville, etc., Co., supra*, is clearly distinguishable from the present case. The implied authority in the servant there was from his being placed in charge and control of the engine. It was implied as it is implied that a conductor has authority to control the movements of persons upon his train. It was not implied because the servant was a fireman or an engineer, but, as stated in the opinion, because he was one in charge and control of the engine. In *Towanda Coal Co. v. Heeman, supra*, a small boy was discovered, by a brakeman, upon a running freight train, when the brakeman threw coal at him, striking him in the face, and in his effort to get off he slipped and fell, sustaining injury. It was held that freight brakemen have no implied authority to eject trespassers. This case was cited in *Carter v. Louisville, etc., Co., supra*, and distinguished from that in the manner we have shown. Several of the cases we have cited are of like character to that of *Towanda Coal Co. v. Heeman, supra*.

To return to the question as to whether conflict existed between the general verdict and the special interrogatory and answer, numbered nineteen, it must be borne in mind that rule ninety-seven must be found to constitute authority to the brakeman to eject trespassers generally, or the general verdict affirming such authority cannot stand. In our opinion it does not constitute such authority. Its proper construction constitutes the brakeman a servant "to do all the

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work required during" the trip and a guardian to protect the train from danger during such trip. There is nothing in the language, when all of its parts are considered together, implying a general guardianship of the train, and, by an express finding of the jury, the train was in charge of a conductor, Rossiter, who, under the authorities cited by us, held the guardianship of the train generally and, as to the ejection of trespassers, particularly. There is nothing in the theory of the case, either upon the pleadings or the evidence, implying that the appellee's trespass, though made a crime by the laws of this state, was such as to suggest danger to the train or to invite interference from the brakeman under his authority to protect the train from danger. Authority to protect the train from danger is far from authority to violently drive from the train a person attempting to steal a ride or cross from one side of the train to the other.

There is no hypothesis upon which the general verdict, finding express authority to eject, can be reconciled with the special finding that rule ninety-seven was the only express authority to eject. In this view of the question the circuit court should have sustained the appellant's motion for judgment *non obstante veredicto*, and the judgment is reversed, with instructions to that court to sustain said motion.

Filed December 20, 1895.

ON PETITION FOR REHEARING.

HACKNEY, C. J.—The petition for a rehearing has been supported by a very earnest and elaborate brief by appellee's counsel. Much has been said of this court's misconception of the theory of the case as outlined by the complaint, and, since the proper view of

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every question in the case must depend upon the true theory of the case, we have again studied carefully the complaint, interrogatories and original briefs, in connection with the present brief. But one of two theories was possible, namely: the brakeman had express authority to eject trespassers or he had implied authority to do so, if the appellee could recover. Counsel does not claim to have embodied both of these theories in his complaint, and, if he did, it would not support him upon the rule that a cause of action must proceed upon some single definite theory. We regarded it then, as we now regard it, to the credit of the counsel who drew the complaint, that he placed it upon the theory of an express authority, since it is, without doubt, we think, the law that such authority as to freight brakeman will not be implied from the general nature of his employment. In this conclusion counsel concurs with us. He quotes from Wood on Rys., cited by us, as follows: "The conductor of a train, being in charge of it, and having full control of it for the time, represents the company as to any matter connected with its management and control, and for an act done by him in the line of his duty, as by the ejection of a trespasser from the train, etc., the company would be unquestionably liable; but for the act of a brakeman of the train, who, without the directions of the conductor, should remove a trespasser from the train, the company would not be liable, unless express authority to do an act, to which the act complained of is incident, is shown, because the act is not one which comes within the scope of his duty." Counsel then says: "I have no contention as to that."

In further discussion of the theory of the case, counsel says, after quoting an extract from his former brief: "Clearly and unmistakably indicating and showing that my contention was that this power

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charged to have been conferred on Harris was implied from the circumstances, the method of doing business, the book of rules and all other sources of evidence which could be introduced; *knowing full well, and realizing all the time and never assuming that anybody else would not know, that there was no possibility of a claim that rule 97 or any other rule contained express authority for a brakeman to eject a trespasser from a railroad train.*"

Again, he says: "Had I advanced the theory that there was express authority conferred by the printed rules and regulations to put the trespasser off the train, why would I have introduced in evidence rule 97? Is it contended that I was unable to read the plain English before me? Or have I the hardihood to write to this court that such authority was contained in that rule?" And again counsel says: "Appellee never has contended that express authority was given to Harris to eject the plaintiff from the train." It will be seen, therefore, that not only does counsel assent to the doctrine of Wood: the non-liability upon implied authority, but renounces the claim of express authority and confirms all that we have said in the original opinion as to the construction of the rules and the finding of the jury that there was no express, general or particular authority to the brakeman to eject the appellee or other trespassers. Notwithstanding these vehement protests against the theory of express authority, counsel, in his original brief, devoted nearly seven pages thereof to a discussion of the construction and effect of the rules set out in the interrogatories to give brakemen authority to eject trespassers. He dwelt particularly upon rule 97, and quoted the definitions, from Webster, of the word "guardian," employed in said rule. In one instance, he said: "The language of that rule means just what

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it says: the brakeman is a *servant* of the train when acting under direct personal orders given him by the conductor or yardmaster. He is *guardian* of the train when following general rules and regulations and acting on his own judgment and discretion, not in the presence of his superior." Again he said: "The very nature of the terms 'In general terms they are the *servants* and *guardians* of the train,' construed in the light of the exact facts shown by interrogatories 5 and 7, show conclusively the meaning intended, namely, the brakeman had general authority to act whenever, in his judgment, action was necessary. * * * * The meaning of the rule is just what the language imports. In the absence of specific orders given by the conductor or yardmaster, the brakeman has general authority to perform any and every act which, in his judgment, seems necessary to the management of the train." This proposition was repeated again and again with reference to the various rules contained in the interrogatories.

Another statement of that brief indicating the appellee's theory of the case is as follows: "The allegations in the complaint found to be true by the general verdict, and which these interrogatories and rules are assumed to overthrow, are as follows: 'That according to the rules and regulations—not rules—in force at said time, the brakeman, George Harris, brakeman as aforesaid, was constituted the servant and guardian of the train upon which said Martin Peterson climbed for the purpose aforesaid, and, as such guardian of such train, it was the duty of said George Harris to protect said train from danger during its trip which it was then entered upon to Chicago, and from trespassers and from the presence of persons upon said train.' Transcript, p. 3, l. 20-27. And after describing the injury and manner of its infliction, proceeds:

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“All from the fault of the wrongful and unlawful act of said George Harris in performance of his duties as aforesaid to said defendant.” These very allegations were quoted by us in the original opinion, omitting that at the close of the above quotation, for the one purpose of demonstrating our conclusion that the appellee’s theory was to declare upon express authority given by the rules. The counsel so used the quotation as clearly indicated by his claim that the effect of the general verdict was to affirm those allegations. We omitted the allegation, “all from the fault of the wrongful and unlawful act of said George Harris in performance of his duties as aforesaid to said defendant,” because we then believed, and still believe, that it was a mere general conclusion, and not a statement of facts. The numerous glaring inconsistencies in the positions taken by counsel, as we have shown, receive additional confusion by the further contention, upon this petition, that the whole theory of the cause of action was centered in an allegation, not referred to on the original hearing, except as it appeared in the copy of the complaint printed in the brief, and which allegation was introduced in reciting the facts and occurrences leading up to the assault and preceding the above quoted allegation as to the authority of the brakeman. It is as follows: “That in charge of and managing said train was a conductor by the name of Rossiter and two brakemen, one of whose name was George Harris, who was what is known as the ‘rear-brakeman.’” This general statement, purely historical and not designed to control the specific allegation of the brakeman’s authority, is now enough to be introduced as the essence of the cause of action.

Some of the misfortunes attending this new theory are that specific allegations control general state-

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ments; that the allegation that a conductor and two brakemen were in charge of and managing the train does not carry the inference that the brakemen had authority co-equal with the conductor, or that they had any authority other than that implied from their position as brakemen, and that the jury expressly found that Rossiter was conductor in charge of the train. As said in Wood, *supra*, if the conductor had ejected the appellee there would have been liability because of the implied authority arising from his being in charge of the train, and that a brakeman so ejecting, without directions from the conductor, would not render the company liable "unless express authority to do an act, to which the act complained of is incident, is shown, *because the act is not one which comes within the scope of his duties.*" This new theory, it is urged, is in line with the case of *Carter v. Railway*, *supra*, and that the original opinion is at variance with that case.

If this new theory were the correct theory of the cause of action, the Carter case would possibly support it, but not being the true theory, it is clearly distinguishable, and was distinguished in the original opinion. This much has been written to demonstrate, even to the conviction of appellee's counsel, that our analysis of the cause of action, as originally given, was correct, and that we were not overreached by the ingenuity of appellant's counsel, nor misguided by the lack of proper acquaintance with the record. There is no occasion to review the numerous cases cited by counsel upon the general doctrine that the master is liable for the torts of his servants committed within the scope of his employment and duties. This doctrine is conceded.

An appeal is made to change the mandate in this case so as to order a new trial instead of a judgment

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upon the appellant's motion. To do so would be to express our doubts as to the correctness of the answers of the jury to the interrogatories, and of this we have no doubt. While fully recognizing the rule that where justice seems to demand it, this court may direct a new trial, we are convinced that upon the cause of action pleaded the appellant was entitled to judgment. Whether it might have been different upon some other theory of the cause is not for us to say, and certainly it is not in the interest of justice and the peace of society that we should recognize a rule which would permit the trial of a cause upon one theory, and, when defeat comes, permit another trial, and so on, that successive theories may be separately tried as long as the plaintiff's ingenuity can devise them.

The petition is overruled.

Filed March 6, 1896.

No. 17,625.

STATE, EX REL. WILSON, *v.* WELLS.

OFFICE AND OFFICER.—*Township Trustee.—Term of Office.*—A township trustee, elected for four years in April, 1890, under Acts of 1889, page 344, fixing the commencement of the term of office in August following the election, cannot, after the election and qualification of a successor in November, 1894, under the Acts of 1893, page 192, providing that such officer shall be chosen at the general election, in November, 1894, and every four years thereafter, hold such office, under the Const., Art. 15, sections 2 and 3, prohibiting the creation of any office for a longer term than four years, and providing that the officer shall hold his office until his successor is elected and qualified.

SAME.—*Township Trustee.—Commencement of Term of Office.*—The change of the time of election of township trustees from April to

144	231
145	300

144	231
151	274
151	291
151	292

144	231
158	357

144	231
171	628

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November, made by the statute, has the effect to postpone the commencement of the term from the first Monday of August, as previously fixed to the time of election and qualification of the successor of the incumbent.

From the Grant Circuit Court.

Elliott & Elliott, for appellant.

Miller, Winter & Elam, H. C. Allen and Brownlee & Paulus, for appellee.

HOWARD, C. J.—At the township election, held in April, 1890, the appellee was elected township trustee of Center township, Grant county; and at the general election, held in November, 1894, the appellant's relator was elected the successor of the appellee in said office.

On November 14, 1894, the relator, having fully qualified, filed his bond as such township trustee, and made demand on appellee for possession of said office, but was refused, the appellee claiming to be entitled to continue in the office until the first Monday of August, 1895. Thereupon the relator brought this action by way of information, setting up all the facts and praying that he be placed in possession of the office. To this information the court sustained a demurrer.

The statutes relating to the election and terms of office of township trustees, and necessary to be considered in the case before us, are as follows:

By sections 57 and 59, of an act approved April 21, 1881 (Acts 1881, 482; sections 4735-4737, R. S. 1881), it was provided that the election of the township trustee should take place on the first Monday of April, 1882, and every second year thereafter; and that his certificate of election should entitle him to qualify and

State, ex rel. Wilson, v. Wella.

enter upon the duties of his office at the expiration of ten days after his election.

By an act approved March 9, 1889 (Acts 1889, p. 344; section 6293, R. S. 1894), the foregoing provisions were so far modified as to require that the township trustee should enter upon the duties of his office on the first Monday of August following such election.

By an act approved March 11, 1889 (Acts 1889, p. 425; sections 8066-8067, R. S. 1894), it was provided that on the first Monday of April, 1890, and every fourth year thereafter, a township trustee should be elected in each township, to hold office for four years, and until his successor should be elected and qualified; and also that thereafter no such trustee should be eligible to said office more than four years in any period of eight years.

By an act approved March 2, 1893 (Acts 1893, p. 192; section 6290, R. S. 1894), the April election was abolished, and it was provided that the township trustee and other township officers should be chosen at the general election to be held in November, 1894, and every four years thereafter; and that the election of township officers should be conducted under the provisions of the law governing said general election.

One of the provisions relating to the general election in November is that at such election "all existing vacancies in office, and all offices, the terms of which will expire before the next general election thereafter, shall be filled, unless otherwise provided by law." Acts 1881, 482; section 6190, R. S. 1894; section 4678, R. S. 1881.

The constitution, in article 15, section 2, prohibits the legislature from creating any office, the tenure of which shall be longer than four years; and in section 3 of the same article, it is declared that when it is provided in that instrument, or in any statute there-

State, *ex rel.* Wilson, v. Wells.

under, that any officer, other than a member of the general assembly, shall hold his office for a given term, such provision shall be construed to mean that the officer shall hold his office for such term and until his successor is elected and qualified.

From the foregoing provisions of law it is evident that when appellee was elected township trustee, in April, 1890, he was elected for a term of four years, and no more; that his term of office was to begin on the first Monday of August, 1890, and end on the day before the first Monday of August, 1894; and that on and after said first Monday of August, 1894, there would have been a vacancy in said office, but that, under the constitutional provision above recited, the appellee was entitled to continue in the possession of said office until his successor should be elected and qualified. As the term for which appellee had been elected would, under the constitutional provision, expire before the next general election following the election in November, 1894, it is clear, also, that such office should be filled by the vote of the people at said election in November, 1894, it not being "otherwise provided by law."

The conclusion seems inevitable that the relator, having been duly elected to fill the office, and having qualified and given bond, was entitled to it.

Counsel for appellee do not controvert the proposition that the term for which appellee had been elected had expired, and that the relator was duly elected to fill such office; but they contend that by force of the act of March 2, 1893, *supra*, taken in connection with the act of March 9, 1889, *supra*, the relator's term of four years was to begin on the first Monday of August, 1895, that being "the first Monday of August following such general election."

When we turn to the act of March 9, 1889, we find

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that "such election," as there referred to, was the election which took place "on the first Monday of April, 1882, and every second year thereafter;" that is, the trustee should take his office on the first Monday of August after each April election. When the term was made four years, instead of two, by the act of March 11, 1889, *supra*, the beginning of the term remained, as before, the first Monday of August after the April election. The term, therefore, which began on the first Monday of August, 1890, ended on the day before the first Monday of August, 1894. The act of 1893 made no reference to the beginning or ending of the term, nor to its length. It left that just as it was. The sole purpose of the act of 1893, so far as relates to the office of township trustee, was to change the election from April to November. Certainly a change in the date of an election cannot affect the term of the office to be filled. If the office becomes vacant by the change of the date of filling it, the constitution makes ample provision therefor, by continuing the old incumbent in office until his successor is elected and qualified.

It will not be said that the legislature may do indirectly, or by implication, what it may not do directly and by an express act. Yet, if the position taken by counsel for appellee is tenable, the legislature, by simply postponing the time when an officer elect shall take his office, might, in effect, lengthen the time during which the incumbent could hold the office beyond the time of the general election and beyond the end of the longest term permitted by the constitution.

The claim is made that the power of the legislature to fix the time when an officer elect shall take his office cannot be abridged. This can be true only within the limits prescribed by the constitution. The

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legislature may, perhaps, extend the term of an incumbent of an elective office to any time not beyond the time of the next general election and within the four year limit. It may also, perhaps, for the better conduct of public business, prescribe a reasonable time after election at which an officer shall qualify and enter upon the duties of his office. But the legislature has no power, directly or indirectly, to fill an office, elective by the people, unless this be done within some such narrow bounds as indicated.

But if the legislature could, in effect, extend the term of the incumbent one year beyond the constitutional limit, and beyond the time of the next general election, by merely postponing the time when his successor should take the office, why could not the legislature, in like manner, extend the incumbent's term two or more years by providing that his successor should not take the office until the expiration of any given number of years, and after the time of any given number of general elections?

The only safe rule within the requirements of the constitution is, we think, that all vacancies in elective offices shall be filled at the election first ensuing after the expiration of the term for which the incumbent was elected, and at which provision is made for election to such offices. Otherwise the door is thrown open for the usurpation by the legislature of the people's right to the election of their own officers.

We think it may be true, as suggested, that if the legislature thought well to do so, it might have provided that the regular terms of township trustees should begin on the first Monday of August, 1895, and every four years thereafter; and to accomplish that result might have provided for a short term to begin the first Monday of August, 1894, and end the first Monday of August, 1895. But the legislature could

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not fill even that short term by providing that the incumbents should hold office one year longer than authorized by the constitution, and beyond the time of an election at which the people could fill the office themselves.

But the statutes under consideration do not expressly, nor, as we think, indirectly, or by implication, provide that the township trustees elected at the general election in November, 1894, should take their office only on the first Monday of August, 1895. On the contrary, it is plain that the acts of March 9 and 11, 1889, *supra*, fix upon the first Monday of August, 1890, and every fourth year thereafter, as the date when the terms of office of the successive township trustees should begin. The term of an office is a definite time, relating to the office and not the officer, and will not be enlarged or varied by changing the date when a person shall be elected to fill such office.

We think these conclusions are fully supported by the numerous authorities adduced in the able brief of counsel for the relator. *State, ex rel., v. Harrison*, 116 Ind. 300; *Parmater v. State*, 102 Ind. 90; *Baker, Gov., v. Kirk*, 33 Ind. 517; *De Armond v. State*, 40 Ind. 469; *State, ex rel., v. Barlow*, 103 Ind. 563.

We do not think that any of the cases cited in the earnest and eloquent argument of counsel for appellee are in point as to an elective officer. In the case of *State, ex rel., v. Bogard*, 128 Ind. 480, so much relied on, the relator was an appointee of the board of county commissioners; here he is an officer elected by the people. No good purpose would be served by extending this opinion in the discussion of these cases. The case at bar seems to us a very plain one in the light of the constitution and of the statutes.

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The judgment is reversed, with instructions to overrule the demurrer to the information.

Filed October 10, 1895.

ON PETITION FOR REHEARING.

HOWARD, J.—From the briefs of counsel on the petition for a rehearing, there seems to be some misapprehension as to the scope and effect of the decision in this case, particularly in reference to the time of the beginning and ending of the relator's term of office.

At the April election, in 1890, the appellee was elected township trustee for the term of four years from the first Monday of August, 1890. So far, then, as the statutes in force when he was elected are concerned, his term would have ended on the day before the first Monday of August, 1894. Meanwhile, however, the legislature changed the date when his successor should be elected from April to November. Consequently, when the four years for which the appellee was elected had expired, and the first Monday of August, 1894, arrived, there was no successor elected and qualified to receive the office.

This was a contingency for which the constitution had expressly provided. By section 3, of article 15, of that instrument, it is declared that "Whenever it is provided in this constitution, or in any law which may be hereafter passed, that any officer, other than a member of the general assembly, shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified."

There was, therefore, no vacancy in the office of township trustee on the first Monday of August, 1894, at the end of the appellee's four year term; but, by

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virtue of the constitutional provision, he held "his office for such term and until his successor" should be "elected and qualified;" that is, until the general election in November following, and thereafter until the officer elect should qualify and demand the office. *State, ex rel., v. Berg*, 50 Ind. 496; *State v. Howe*, 25 O. St. 588; *Baker City v. Murphy* (Or.), 42 Pac. Rep. 133.

The relator was elected at the November election; and on November 14, 1894, having qualified and filed his bond, he demanded possession of his office. The relator being entitled to the office on said 14th day of November, 1894, and having demanded it, the appellee's term at once ended and the term of the relator began.

But the relator was elected for a term of four years. His term will, therefore, continue until the election of his successor at the November election in 1898, and thereafter until such successor shall, in turn, qualify and demand the office. It is not true, therefore, that township trustees hereafter are to be elected three months after their terms have begun, or that they shall continue in office three months after their terms have ended. While it was provided in the statute that the term should begin on the first Monday of August, 1890, and every four years thereafter, yet that statute cannot fully apply in case of trustees and assessors elected since the change of the time of election from April to November; and so long as the election of these officers shall take place after the first Monday of August, every four years, so long the beginning of the successive terms of office must be postponed until after the date of such election. It follows also, of course, that, so long as the election takes place at a date later than the first Monday of August, every four years, so long no trustee or assessor can hold his office after the election and qualification of

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his successor. Neither can there be any election of such officer except “at the general election to be held on the first Tuesday after the first Monday in November, 1894, and every four years thereafter,” so long as the act of March 2, 1893 (Acts 1893, 192; section 6290, R. S. 1894), remains in force save only in case of vacancy, to fill the unexpired term.

The petition is overruled.

Filed March 6, 1896.

No. 17,675.

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NEW TRIAL.—*Misconduct of Bailiff.—Jury.*—The misconduct of the bailiff, in charge of a jury in a criminal case, in permitting some of the jurors to talk with different persons during an intermission, after the court had given part of its charge, does not entitle defendant to a new trial, where it appears by the affidavit of defendant’s attorney that nothing was said concerning the cause of the trial, and that all the conversation took place in the presence of the bailiff, especially where it does not appear that such misconduct was not known to defendant before the jury retired to consider of their verdict.

SAME.—*Separation of Jury.—Criminal Law.*—A new trial will not be granted in a criminal case because of a separation of the jury without leave of the court, after they had retired to deliberate upon their verdict, in violation of the statute, if the verdict appears clearly to be right upon the evidence.

CRIMINAL LAW.—*Affidavit and Information.—When May be Filed.*—It is not necessary that the court be actually opened for the transaction of business at the filing of an information, under section 1748, R. S. 1894, providing that a public offense may be prosecuted by information, where the party charged is not already under indictment therefor, and the court is in session and the grand jury has been discharged for the term, but it is sufficient if it is filed with the clerk at any time after the commencement of a term, and before its final adjournment.

SAME.—*Perjury.—Indictment.—Oath.*—An indictment or information for perjury need not expressly allege authority in the officer who

144	240
144	295
146	429
144	240
151	664
144	240
155	696
144	240
160	540
144	240
161	298
144	240
167	119
167	121

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administered the oath to defendant to administer the same, where the facts alleged show that he had such authority.

CHANGE OF VENUE.—*From County.—Discretion.*—The granting or refusal of a change of venue in a criminal action, upon the ground of undue prejudice against defendant, is within the discretion of the trial court, under section 1840, R. S. 1894.

APPELLATE PROCEDURE.—*Motion for New Trial.—Bill of Exceptions.*—Recitals in a motion for a new trial cannot perform the office of a statement required to be incorporated in a bill of exceptions.

INSTRUCTIONS TO JURY.—*Joint.—Appellate Procedure.*—To render a specification of error in the giving of several instructions available as a cause for a new trial, all of the instructions named must be incorrect.

EVIDENCE.—*Authority to Administer Oaths.—Deputy Clerk.*—Evidence that the person who administered the oath to defendant charged with perjury was acting as, and performing the duties of deputy clerk at the time, is sufficient to establish his authority to administer the same.

SAME.—*Perjury.—Oath.*—It is not necessary to prove that the oath administered to defendant charged with perjury was in writing, where it is not so charged in the information.

SAME.—*Separation of Jury.*—That some of the jurors during deliberation upon their verdict, accompanied by the officer, visited a water-closet, does not constitute a separation of the jury within the meaning of the statute.

OATH.—*When Regarded as Administered by the Court.*—An oath administered in the presence of the court by an officer, who is incompetent, is regarded as administered by the court.

TRIAL.—*Jury.—Taking Indictment to Jury Room.*—It is proper for the court to permit the jury to take the information with them upon retiring to deliberate upon the verdict.

From the Kosciusko Circuit Court.

Wood, Royse and H. R. Robbins, for appellant.

W. A. Ketcham, Attorney-General, L. B. McKinly, L. R. Stookey and H. S. Biggs, for State.

MONKS, J.—Appellant was tried and convicted upon an affidavit and information charging him with

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the crime of perjury. There was a motion to quash the information, which was overruled. A motion for a change of venue was filed by appellant, which was overruled.

Appellant's motion for a new trial was also overruled.

The first error assigned is that the court erred in overruling the motion to quash the information.

The first objection urged to the information is that there is nothing in the record showing that the affidavit and information were filed in term time, and that, therefore, the court below had no jurisdiction.

It is provided by section 1679, R. S. 1881, section 1748, R. S. 1894, that "Whenever a public offense has been committed and the party charged is not already under indictment therefor, and the court is in session, and the grand jury has been discharged for the term, the same may be prosecuted in the circuit and criminal courts by information based upon affidavit." Affidavits and informations charging felonies cannot, therefore, be filed in vacation, but it is not required that they be filed while the court is in session. It is sufficient if they are filed with the clerk during term time, that is, at any time after the commencement of a term of court and before its final adjournment. It is not necessary that the court be actually open for the transaction of business. *Stefani v. State*, 124 Ind. 3.

It appears from the record that the affidavit charging appellant with perjury was sworn to on the 26th of February, 1895, and that said affidavit and the information thereon were filed during the February term 1895 of said court, and that the trial of said cause was commenced on March 5, being the 26th day of said February term.

It is evident that the affidavit and information were filed in said court on or after February 26, and be-

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fore March 5, and during the February term of the court, and not in vacation, as claimed by appellant.

It is next insisted that the information is insufficient, for the reason that it is not alleged that the oath administered by Oren J. Chandler, deputy clerk, was one that the clerk was competent to administer. Citing *McGregor v. State*, 1 Ind. 231.

The information charged that the alleged perjury was committed by appellant while testifying in the Kosciusko Circuit Court, before the Hon. Edgar Hammond, sole judge of said court, as a witness on behalf of the defendant in the case of *State v. Wright*, in the court below.

This court knows, as a matter of law, that the clerk and deputy clerk of the Kosciusko Circuit Court had authority to administer the oath to appellant, as alleged in the information. When the facts alleged in an indictment or information for perjury show that the oath was one the officer administering it had authority to administer, it is not essential that such authority should be expressly averred. Besides, when an oath is administered by a clerk or his deputy in open court, it is under the superintendence of the court, and is as obligatory as if it had been administered by the judge of the court. *Server v. State*, 2 Blackf. 35.

The case of *McGregor v. State*, *supra*, is not in point. That was a case where the indictment charged that the perjury was committed by the defendant making an affidavit before the clerk of the Madison Circuit Court. At that time the authority of the clerks of the circuit court to administer oaths was limited to certain specified cases, and the court held that the indictment was bad, as it did not show that the oath upon which the affidavit was founded was one which the clerk was competent to administer.

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Appellant claims "that his testimony, as set forth in the information upon which the charge of perjury was predicated, was not material to the issue joined in the case of *State v. Wright*."

The testimony of appellant, set forth in the information, strongly tended to establish an alibi in favor of Wright, who was being tried on a charge of burglary. The materiality of the matter testified to by appellant is fully shown by the facts alleged in the information, and also by a general averment to that effect.

The information was sufficient and met all the requirements of section 1747, R. S. 1881 (section 1816, R. S. 1894), which provides that "In an indictment or information for perjury or subornation of perjury, it shall only be necessary to set forth the substance of the controversy, or the matter in respect to which the crime was committed, and in what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, with the proper averments to falsify the matter whereof the perjury may be assigned, without setting forth any part of any record or proceeding, or the commission or authority of the court, or other authority before which the perjury was committed."

The second error assigned is that the court erred in refusing to grant appellant a change of venue. This is also specified as one of the causes for a new trial.

Appellant filed his affidavit and motion for a change of venue from the county. The application was supported by the affidavit of his attorney. The prosecuting attorney filed counter affidavits of fifty-one persons, who stated that they were well acquainted with the citizens of the county, and that

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there was no undue prejudice against appellant, and that, in their opinion, he could have a fair and impartial trial in said county. The court overruled the motion.

It is within the discretion of the court whether a change of venue shall be granted from the county. Section 1771, R. S. 1881 (section 1840, R. S. 1894); *Reinhold v. State*, 130 Ind. 467, and cases cited.

There is nothing in the record showing an abuse of this discretion.

The next error assigned calls in question the action of the court in overruling the motion for a new trial.

Among the irregularities assigned as causes for a new trial are the following:

1. Misconduct of counsel for the state in the closing argument to the jury.
2. That the court permitted disorder and demonstration in the court room, favorable to the prosecution, by which the appellant was prevented from having a fair trial.

The details of these alleged irregularities are set forth with great particularity in the causes for a new trial, but appellant has not referred to the page and line of the transcript where a statement of any such irregularity or misconduct is incorporated in a bill of exceptions. The only evidence of such irregularities contained in the record is in the motion for a new trial. Recitals in a motion for a new trial cannot perform the office of a statement required to be incorporated in a bill of exceptions. Elliott App. Proced., sections 294, 295 and 815.

No question is presented by these specifications in the motion for a new trial.

The fourth cause for a new trial was "that the court permitted the jury to take the information with them

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when they retired to the jury room to deliberate upon their verdict."

This was not error. It is proper for the court to permit the jury to take with them the pleadings in a cause when they retire to the jury room for final consultation. *Stout v. State*, 90 Ind. 1; Gillett's Crim. Law, section 937.

Besides the court instructed the jury that the information was not evidence against appellant, and could not be considered by them as such.

The fifth cause for a new trial is that the court erred in giving of its own motion instructions one, two, three, four, six, seven and nine. To render this specification of error available as a cause for a new trial, all the instructions named must be incorrect. *Ohio, etc., Ry. Co. v. McCartney*, 121 Ind. 385; *Laurence v. Van Buskirk*, 140 Ind. 481; *Indiana, etc., Ry. Co. v. Snyder*, 140 Ind. 647.

It is not claimed by appellant that there was any error in giving the first, second and fifth instructions.

The third instruction was concerning the rule of reasonable doubt, and is a copy of one approved by this court in *Garfield v. State*, 74 Ind. 60. For the reason that at least four of said instructions were correct, this cause for a new trial is not available. We have, however, examined all the instructions given, and think they contain a correct statement of the law.

The sixth cause for a new trial was that the court erred in refusing to give instruction one, tendered by appellant.

By this instruction the court was requested to charge the jury "That the State must prove as true that the oath was administered by Oren J. Chandler, deputy clerk, in writing; that Oren J. Chandler was duly appointed in writing as deputy clerk; that he

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was duly sworn as deputy clerk; that his oath of office was duly entered on the clerk's commission."

The State was not required to prove any of these propositions. To establish the authority of Oren J. Chandler to administer the oath to appellant, it was merely necessary to prove that he was acting as and performing the duties of deputy clerk. Wharton Crim. Law, sections 1263, 1287, 1315; Wharton Crim. Ev., section 164.

It was not charged in the information that the oath administered to appellant was in writing, and it was not necessary to prove that it was in writing.

The law does not require that the oath of office taken by a deputy clerk shall be entered on the back of the clerk's commission, as stated in said instruction. Sections 5568, 5569, R. S. 1881 (sections 7584, 7585, R. S. 1894.)

If the person who administers the oath in fact has no authority to administer it, that is a matter of defense. *Muir v. State*, 8 Blackf. 154; 2 Wharton Crim. Law, section 1315. But an oath administered in the presence of the court by an officer, though incompetent, is regarded as administered by the court. *Server v. State*, *supra*; Wharton Crim. Law, sections 1263, 1287, 1315; *Stephens v. State*, 1 Swan (31 Tenn.) 157.

The instruction asked by appellant was properly refused by the court. The seventh and eighth causes for a new trial are that the verdict is not sustained by sufficient evidence and is contrary to law. We have read the evidence and find that it fully sustains the verdict of the jury.

It is also urged as a cause for a new trial that the court, after having been requested to instruct the jury in writing, read section 2006, from the Revised

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Statutes of 1894, and also read the information to the jury.

The record shows that on March 8, at 5 o'clock p. m., appellant filed his motion in writing requesting "the court to give all his instructions to the jury in writing." The record also shows that the argument of counsel had been concluded and the jury instructed before 5 o'clock p. m. on said day. It is evident from the statements in the record that appellant's said request was made after the close of the argument of counsel and after the court had instructed the jury. The request was made too late.

The statute provides that such request must be made before the commencement of the argument. Section 1823, R. S. 1881 (section 1892, R. S. 1894).

The court committed no error, therefore, in not giving its instructions in writing.

The remaining cause urged for a new trial is misconduct of the jury and bailiff.

It appears from the record that after the court instructed the jury, they retired to their room, but before they had commenced to deliberate on the verdict, the court recalled them and said to them in open court that "they would remain in charge of the bailiff from that time, 5 p. m., until 7:30 p. m., at which time he would furnish his instructions to them."

The affidavit of Henry R. Robbins, attorney for appellant, made in support of this cause for a new trial, stated that during this time, while in charge of the bailiff, they were taken to a restaurant for their supper, to the postoffice and to the residence of the bailiff, and from there to the court room; that during said time four of the jurors went to the water-closet, two to closets in one room and two to closets in another room; that the bailiff accompanied said jurors to the

outside door of the room adjacent to said closet; that the jury were permitted to talk with different parties in the bailiff's presence, but not about the cause on trial.

There is nothing in the record showing any separation of the jury, except when the jurors visited the water-closet, when they were accompanied by the bailiff. This was not a separation of the jury within the meaning of the statute. *Cooper v. State*, 120 Ind. 377, (384).

The conduct of the bailiff in permitting the jurors to talk with different persons was reprehensible, and he should have been promptly punished therefor by the court.

It is shown by the affidavit of Robbins that nothing was said by the jurors or by any one to them concerning the cause on trial, and that what was said was in the presence of the bailiff.

We do not think there was such misconduct of the bailiff and jury as would entitle appellant to a new trial. Besides, it does not appear that the alleged misconduct was not known to appellant before the jury retired to consider of their verdict. *Mergentheim v. State*, 107 Ind. 567 (573); *Henning v. State*, 106 Ind. 386.

No separation of the jury is shown by the record within the meaning of the second clause of section 1842, R. S. 1881 (section 1911, R. S. 1894.) Even when there is a separation of the jury without leave of the court, after they have retired to deliberate upon their verdict, in violation of said section, if the verdict appears clearly to be right upon the evidence, a new trial will not be granted for that cause. *Riley v. State*, 95 Ind. 446; *Cooper v. State*, *supra*.

The verdict in this case was clearly right upon the evidence, so that even if there had been a separation

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of the jury in violation of said section, a new trial could not be granted for such cause.

There is no error in the record.

Judgment affirmed.

Filed March 6, 1896.

No. 17,695.

RANSBOTTOM v. THE STATE.

INSTRUCTIONS TO JURY.—*Special.—Delivery to Court Before Argument.*—A party who desires special instructions to be given by the court must deliver them to the court before the argument to the jury commences, and is not entitled to have any consideration given to his instructions offered later.

CRIMINAL LAW.—*Rape.—Resistance.*—Actual physical resistance is not essential to the crime of rape, where such resistance was prevented by fear produced by the defendant's threats.

SAME.—*Failure to Record Indictment.—Appeal.*—The failure to comply with section 1741, R. S. 1894, requiring indictments to be recorded, does not injure a defendant who is tried on the indictment that is actually returned by the grand jury.

EVIDENCE.—*Rape.—Resistance.*—In determining whether the resistance by the prosecutrix in a prosecution for rape was rendered less effective, or wholly averted by fear, the fact that she had but barely reached the age of consent, and was the only female in a lonely house, surrounded by a trio of strange young men, and had been brought there under false pretenses practiced on her mother and herself by defendant, are proper matters to be considered.

SAME.—*Presumption.—Affidavit for Continuance.*—No presumption can be indulged against the truth of the facts stated in an affidavit for a continuance, nor can any presumption be indulged in favor of such an affidavit, where it fails to state a necessary fact, or insufficiently states it.

CHANGE OF VENUE.—*From County.—In Discretion of Court.*—The refusal of a change of venue in a criminal case, on account of alleged prejudice and excitement in the county against the appellant, is within the sound discretion of the trial court, under section 1840, R. S. 1894, and will not be disturbed on appeal, in the absence of an abuse of such discretion.

144	250
144	295
144	362
144	250
157	153
144	250
164	429
144	250
168	93
168	620
168	623

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CONTINUANCE.—Absent Witness.—Subpœna.—The statement in an affidavit for a continuance in a criminal trial, that defendant issued a subpoena to the sheriffs of certain counties, commanding each to summon a witness, does not show that he caused the proper officer to issue a proper subpoena to each of the sheriffs mentioned, commanding them to summon the witness to appear in the court in which the trial is had, to testify in the cause on his behalf.

SAME.—Absent Witness.—Evidence.—Subpœna.—An affidavit for a continuance, on the ground of the absence of a witness, is not required to show that the sheriff, in serving the subpoena, left the same at the residence of the witness, the latter not being found.

SAME.—Absent Witness.—Same Facts in Personal Knowledge of Defendant.—Criminal Law.—That an affidavit for a continuance in a criminal trial, on the ground of an absent witness, under section 1850, R. S. 1894, which requires a statement that defendant is unable to prove facts by any other witness whose testimony can be as readily procured, discloses that the facts proposed to be proved are within the personal knowledge of the defendant, is not a cause for the refusal of the continuance.

SAME.—Absent Witness.—Affidavit.—Necessary Facts.—Subpœna.—The statement in an affidavit for a continuance in a criminal trial, that defendant could not learn of the whereabouts of the absent witness in time to send a subpoena for him to the county where he is shown by the affidavit to be, is insufficient to establish such fact in the absence of a statement of the facts from which the conclusion was drawn.

From the Marshall Circuit Court.

H. R. Robbins, for appellant.

W. A. Ketcham, Attorney-General, for State.

MCCABE, J.—The appellant was convicted in the Marshall Circuit Court of rape, alleged in the indictment to have been committed on one Esther Schroll on December 4, 1894.

Many errors are assigned, among which are the overruling of appellant's motion to quash the indictment, overruling appellant's motion for a new trial, overruling his motion for, and in arrest of, judgment. The only reason urged in argument in support

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of the motion to quash and in arrest is that the record does not disclose that the indictment was recorded as required by section 1741, R. S. 1894, (R. S. 1881, section 1672). It was settled by this court in *Heath v. State*, 101 Ind. 512, that the failure to comply with such requirement does not injure a defendant who is, as was the case here, tried on the indictment that was actually returned by the grand jury. One of the reasons assigned for a new trial was the refusal of the appellant's application for a change of venue on account of alleged prejudice and excitement in the county against the appellant. The statute leaves such an application to the sound discretion of the trial court. R. S. 1894, section 1840 (R. S. 1881, section 1771). And unless it appears that such discretion was abused to the injury of the complaining party this court cannot interfere. *Walker v. State*, 136 Ind. 663, and authorities there cited. There was no error in either of these rulings.

The refusal to continue the cause on application of appellant is made one of the reasons for a new trial, as well as one of the specifications in the assignment of errors.

The continuance was asked on the ground of the absence of Charles Grenert.

There is and can be no question made, that the facts proposed to be proven by the absent witness are competent and material evidence for the appellant.

There are but two objections made to the affidavit in support of the court's ruling refusing the application to continue. The attorney-general contends that the affidavit is insufficient because it fails to show that the sheriff, in serving the subpoena, left the same at the residence of the witness, which residence was shown to be in Starke county, he being not found. No authority is cited by the attorney-general in support

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of this proposition, nor do we know of any. That objection cannot be maintained.

It is urged by the attorney-general that appellant, being a competent witness, under section 1867, R. S. 1894, for himself, and the affidavit disclosing that the fact proposed to be proven by the absent witness was one which the appellant knew more about than the absent witness, or as much, at all events, his statement in his affidavit, required by section 1854, R. S. 1894, that the defendant "is unable to prove such facts by any other witness whose testimony can be as readily procured," is on its face untrue.

It is true, it does appear, from the affidavit, that appellant would necessarily know the facts proposed to be proven, as well, at least, as the absent witness, and the law makes appellant a competent witness in his own behalf.

It has been held by this court in a civil case that it is no cause for refusal of a continuance for an absent witness to a material fact that the same is known to the party himself, he being competent to testify to it. That he is not bound to resort to his own testimony, and is entitled to make his proof by disinterested and impartial witnesses. *Fox v. Reynolds*, 24 Ind. 46. We think that is a sound rule. And if it is so in a civil case, the reason is still stronger why it should be so in a criminal case. But going beyond the brief on behalf of the State, we are led to inquire whether the affidavit shows that the appellant exercised due diligence to secure the attendance of the witness. The affidavit as to diligence, after stating that the absent witness resides in Starke county, states "that on March 4, being the first day of this term of court, the defendant issued a subpoena to the sheriff of Marshall county, also to the sheriff of Starke county, Indiana, commanding each to summon Charles Grenert;

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that each of said sheriffs made diligent search and inquiry, but that said Charles Grenert evades or eludes them so that a subpoena cannot be served; * * * that said witness resides in Starke county, Indiana, and * his family, to-wit: his brother, Geo. Grenert, said that said witness had a job of making stave bolts or cutting wood in Grant county, and would return by plowing time in April, being about April 10; that affiant could not learn of his whereabouts in time to send subpoena to Grant county, but affiant verily believes that Grenert will return about April 10, or shortly thereafter."

Courts of justice have more efficient means of inducing the attendance of witnesses who are within the State than waiting for plowing time to bring them back.

No presumption can be indulged against the truth of the facts stated in an affidavit for a continuance, however strongly the court may suspect them to be false. Neither can any presumption be indulged in favor of such affidavit where it fails to state a necessary fact or insufficiently states it. The statement in the affidavit that "the defendant issued a subpoena to the sheriff of Marshall county, Indiana, also to the sheriff of Starke county, Indiana, commanding each to summon Charles Grenert," is far from showing that appellant caused the proper officer to issue a proper subpoena to each of the sheriffs mentioned, commanding them to summon the witness to appear in the Marshall Circuit Court to testify in the cause on behalf of appellant. If the return of the subpoena had been stated, and it exhibited to the court, the defective statement might have been cured. But there is nothing of the kind shown. The bare statement that the defendant issued the subpoena is no better

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than if the affidavit had stated that the clerk of the Starke Circuit Court had issued the subpoenas.

But that is not all. The affidavit shows that appellant was in possession of information that the absent witness was at that time in Grant county, Indiana, but it does not state when he received that information. It does state that he could not learn of his whereabouts in time to send a subpoena to Grant county. But that is not stating the facts concerning his diligence, but his conclusion from those facts. It was the exclusive province of the court to draw that conclusion, and his to state the facts. The court might, if he had stated the facts, draw an entirely different conclusion. Evidently fearing such a result, he has attempted to usurp the functions of the court and has stated his conclusion from the facts, namely, that appellant could not learn his whereabouts in time to send subpoena to Grant county, instead of stating the facts as to what he did and when he first learned that the witness was in Grant county, and allow the court to draw the conclusion as to whether there was time enough after he learned the whereabouts of the witness to send subpoena to Grant county. See *McDermott v. State*, 89 Ind. 187; *McKinsey v. McKee*, 109 Ind. 209.

Another ground specified in the motion for a new trial and urged as error, is the refusal to give certain instructions asked by the appellant. The record fails to show when the instructions were asked, whether before or after the trial. A party who desires special instructions to be given to the jury, must deliver them to the court before the argument to the jury commences, and is not entitled to have any consideration given to his instructions offered later. *Hege v. Newsom*, 96 Ind. 426; *Evansville, etc., R. R. Co. v. Crist*, 116 Ind. 446 (2 L. R. A. 450).

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The presumption is that the court refused them because not requested in time, unless for the reason they had already been substantially given by the court in its instructions to the jury, which we think is clearly the case.

It is urged that the evidence does not support the verdict in that it fails to establish that the sexual connection was accomplished by force and against the will of the prosecutrix.

The testimony of the injured girl is to the effect that she was 14 years of age on August 28, 1894, and that she and some older sisters lived with their widowed mother in Knox, Starke county, Indiana, and that on December 4, 1894, appellant came to her mother's house and, representing himself as a Mr. Bottorff, living in the edge of Marshall county, applied to hire a girl to do housework for his wife, who, he represented, had a little child about two years old, but that his wife was not stout enough to take care of the child and do her work. The older sister present refused to go, and it was finally agreed that Esther should leave school and go with him, the family all believing him to be Mr. Bottorff and a married man, all of which turned out to be false. Esther's mother packed her clothing in a valise hastily, and she started with him, as they all supposed, to appellant's home in Marshall county. About 8 o'clock at night they reached the house of a man by the name of Morris, in the edge of Marshall county, but neither Morris nor his family were at home. But there were two young men there named Bill Sheperd and Charles Grenert standing outside of the house when appellant drove up with Esther in the wagon. Appellant told her his wife was away to her folks and would not be back till about midnight. The young men seemed to know appellant, and Esther had a slight knowledge of but one of

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them. Esther and appellant went into the house and the two young men put away appellant's team. There was nobody else in the house. After the team was put up the two young men came back into the house. After Esther had sat there some time, and answering appellant's inquiry if she was sleepy, said she was, he showed her into a bedroom and left the lamp in her bedroom and he went back into the other room. The other young men went up stairs to bed. Appellant went back into her bedroom, took the lamp out to the other room, blew it out and came back into her bedroom, called her three times, to which she made no answer. He then took off his clothes and got in bed with Esther. The sexual intercourse took place in that bedroom. The prosecutrix testifies that it was against her will, that she made outcry, but that by threats made by him to kill her if she did not keep still, she was put in fear.

It was said in *Anderson v. State*, 104 Ind. 467, at page 474, "that it was incumbent upon the State to show that the prosecuting witness had resisted with all the means within her power. * * The nature and extent of the resistance which ought reasonably to be expected in each particular case, must necessarily depend very much upon the peculiar circumstances attending it, and it is hence quite impracticable to lay down any rule upon that subject applicable to all cases involving the necessity of showing a reasonable resistance." Citing *Ledley v. State*, 4 Ind. 580; *Pomeroy v. State*, 94 Ind. 96 (s. c. 48 Am. R. 146); *Commonwealth v. McDonald*, 110 Mass. 405; 2 Bish. Crim. Law, section 1122. And in *Huber v. State*, 126 Ind. 185, at page 186, it is said: "Resistance or opposition, by mere words is not enough; the resistance must be by acts, and must be reasonably pro-

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portionate to the strength and opportunities of the woman. Where, however, fear or violence overcomes resistance, a different rule applies." There was evidence from which the jury were justified in believing that resistance was prevented by fear produced by appellant's threats, taking into consideration, as they had a right to do, the circumstances of getting her to the lonely, strange house late in the darkness of the night, all unexpected to her, whereat she was the only female, surrounded by a trio of strange young men; and that she had been brought there under base false pretenses, practiced on her mother and herself by one of the trio, with circumstances pointing suspiciously at the other two as at least cognizant of the fraud, if not accomplices, she being but a mere child, inexperienced and ignorant of the true relation of the sexes, barely over the age fixed by law at which consent implied from non-resistance takes out of the act the deep, dark, felonious hue; these circumstances, together with her size, appearance, and her intelligence, were all proper matters to be considered in determining whether resistance on her part was rendered less effective or wholly averted by fear. The evidence was of such a character as to justify the jury in finding that it was. The case of *Eberhart v. State*, 134 Ind. 651, and numerous authorities there cited, are very much in point here and support the conclusion here reached.

We, therefore, cannot say that the evidence does not support the verdict.

Another ground on which it was urged a new trial ought to have been granted is that the trial court permitted the State to produce before the jury for their inspection the pair of drawers worn by the prosecutrix on the night when the alleged offense was committed, after the defendant had closed his evidence.

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Such ruling was within the sound discretion of the court, upon which no reversible error can be predicated if the defendant is afforded an opportunity to meet such new evidence in chief. *Kahlenbeck v. State*, 119 Ind. 118. No complaint is made that such opportunity was not afforded.

It is contended that the verdict is vindictive and more the surrender to the voice of prejudice than to sound reasoning. If the verdict had been 21 years in the penitentiary we could not have disturbed it as being too severe.

It may be that the uncontradicted evidence created some prejudice in the minds of the jurors against the defendant.

But another jury would have to be made up of men. And how any twelve men could listen to such evidence as stands uncontradicted in this case without feeling some slight prejudice against the author of such a gigantic scheme of villainy it is difficult to understand. And yet the jury succeeded, under the wise directions of the learned judge who presided at the trial, in keeping that prejudice down so as to return a verdict of only a little over one-half the punishment they might have given the defendant. While it may seem severe to appellant, who seems to have thought very little about the law and more of himself, yet it may serve to teach him and others that the majesty of the law protects the weak and helpless as well as the strong.

Finding no available error in the record, the judgment is affirmed.

Filed March 6, 1896.

No. 17,478.

SHRACK v. COVAULT, SHERIFF, ET AL.

INJUNCTION.—*Against Enforcement of Judgment.—Collateral Attack.*—A proceeding to enjoin the enforcement of a judgment by execution constitutes a collateral attack thereon, and cannot be maintained on account of errors for irregularities merely.

(See note at end of opinion.)

JUDGMENT.—*Collateral Attack.—Drainage.*—That a drainage ditch has not been constructed according to plans and specifications, does not render a judgment foreclosing a ditch lien vulnerable to collateral attack.

From the Blackford Circuit Court.

Gregory & Silverburg, J. N. Templer & Son and Elliott & Elliott, for appellant.

T. E. Ellison, for appellees.

HOWARD, J.—This was an action brought by the appellant to enjoin the appellees from collecting a judgment against him. A demurrer was sustained to the complaint, and this ruling of the court is the only error assigned.

It is a familiar doctrine, as said in *Krug v. Davis*, 85 Ind. 309, that such a proceeding to enjoin the enforcement of a judgment by execution constitutes a collateral attack upon the judgment and cannot be maintained on account of errors or irregularities merely, but only upon a showing that the judgment is void.

The judgment sought to be enjoined in the present case was rendered on foreclosure of a ditch lien; and we are of opinion that it clearly appears from the complaint that the judgment, to say the least of it, is not wholly void.

144	260
144	700

144	260
148	607
152	95

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The drain in question is about eleven miles in length, and is located in the counties of Blackford and Jay. The petition for its establishment was filed in the Blackford Circuit Court September 4, 1884. The complaint in the case at bar shows that all the proceedings for the establishment of the ditch were taken in conformity with the provisions of the statutes then in force, and that the work was duly established by the court March 25, 1885, and a commissioner thereupon appointed to construct the same according to the plans and specifications approved by the court. Assessments were made against each tract of land found benefited, to the full amount of the benefits charged in each case. The assessments were declared due and payable in five equal installments, the first payable on the 30th day of March, 1889, and the remaining installments upon the fourth Saturday of each month thereafter. Afterwards the appellee, Charles A. Rhine, as commissioner, brought suit against the appellant to collect the assessments so made against his lands, and on July 3, 1891, recovered judgment therefor, with a decree of foreclosure of the lien upon said lands. The judgment and decree so obtained are still in force; and it is to enjoin the collection of the same that this action was brought.

The reason given in the complaint why the collection of the judgment should be enjoined is, that the work has not in fact been constructed according to the plans and specifications, that the ditch was made too wide and too deep and the banks not of the proper slope.

Even if this were an appeal from the judgment and decree fixing the amount of the lien and foreclosing the same, and not as it is, simply a collateral attack upon that judgment, still we think the reason here

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given against the validity of the judgment would be insufficient.

The Indianapolis, etc., Grav. Road Co. v. State, ex rel., 105 Ind. 37, which was an appeal from a judgment and decree for the collection of a ditch assessment, it was averred, in answer to the complaint, that the work did not conform to the plans and specifications or the order of the court; that the commissioner did not intend to construct such a ditch as ordered; that he had departed widely from the specifications in many particulars; that he could not, and did not, intend to finish the ditch; that he had abandoned about 500 feet of the work at the end of the ditch as proposed and laid out; and that, by reason thereof, the water would be poured into another ditch of inadequate capacity, and would be backed on and over the defendant's road, to its damage in a much larger sum than the amount of its assessment. A demurrer was sustained to this answer, and that ruling was approved by this court.

Judge Mitchell, in giving the decision of the court in that case, said: "The drainage commissioner, while he is constructing the work, is under the control and direction of the court, and it is provided in the statute that he must obey such direction, subject to the penalty of being dealt with as for a contempt, or of being removed by the court, and subject to damages on his bond. The remedy, therefore, is to apply to the court, and, through its order and intervention, secure the due execution of the work. The proceeding establishing the ditch and assessing benefits having been regularly taken, payment of assessments may be enforced, and it will be no answer in such a case to assail either the practicability of accomplishing the work as ordered or the conduct of the commissioner who has its execution in charge."

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So in *Hackett v. State*, 113 Ind. 532, also an action for the collection of drainage assessments and where the collection of the assessments was resisted on the plea that the ditch had not been constructed according to the plans and specifications, even so far that the ditch had been dug "at another and totally different place from that fixed by the court, and nowise in accordance with the specifications adopted for its construction, whether as to depth, width or located line," the court, in relation to such alleged misconduct of the superintendent of construction and of the contractor, said that such misconduct "did not affect the order of court establishing the ditch and requiring its construction. Notwithstanding such misconduct, the power and duty of the court still remained to cause the assessments to be collected, and the work to be completed in accordance with the spirit and intention of its order made in the first instance."

And in *Racer v. State*, 131 Ind. 393, which was an appeal from a decree for the collection of assessments for the construction of the same ditch now under consideration, the decree also being in favor of Charles A. Rhine, drainage commissioner, and one of the appellees in the case at bar, the court said: "But it by no means follows that because the duty of the commissioner is to compel the performance of the work in substantial compliance with the contract, his failure to do so will constitute a defense to a suit to enforce an assessment. The land-owner is not without remedy, but his remedy is not by way of defense to the assessment. His remedy is to make application to the court having control of the work, and whose agent the commissioner is, to compel a performance of duty by the contractor and the commissioner. This was expressly decided in the case of *Indianapolis, etc., G. R. Co. v. State, ex rel., supra* (105 Ind. 37). In that

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case it was said: 'The remedy is, therefore, to apply to the court, and through its order and intervention secure the due execution of the works.' The answer in the case from which we have quoted is very much stronger than the answer in the case before us, for in that case the answer averred that it was impossible to construct the proposed ditch, and stated facts tending to support that averment; and it also averred that the ditch had been abandoned. It is clear, therefore, that we must either directly overrule that case or adjudge the answer before us to be insufficient. * *

* * An order could have been obtained without delay, and the court could have compelled obedience by summary modes. If the appellant had been diligent no loss could have occurred to him or to any other property-owner by reason of a departure from the requirement of the contract."

The holding thus made in *Racer v. State, supra*, may be regarded, to all intents and purposes, as the law of the case at bar. While some of the parties are different, yet the facts and circumstances in the two cases are practically identical. In that case, a judgment for the collection of a ditch assessment was affirmed; in this case, what is substantially the same judgment is sought to be overthrown by enjoining its collection. And no facts here pleaded show that the judgment which there successfully withstood a direct attack on appeal, is not here even more secure against collateral attack by injunction.

Appellant, however, contends that *Racer v. Wingate*, 138 Ind. 114, which was another and later action growing out of the construction of the same ditch, decides the issues in this case against the contentions of appellees. The only question decided in *Racer v. Wingate, supra*, was that the ditch was not constructed according to the plans and specifications.

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The failure to observe the plans and specifications as set out in the complaint before us consisted in this: That whereas the plans and specifications required that the banks should be of the slope of one to one, and the width of the ditch at bottom to be from one foot to four feet, varying between certain stations; yet that the ditch was in fact constructed with perpendicular banks, and the width at bottom between said stations varied from three to fifteen feet. In other words, the ditch was made more capacious than the specifications called for; and the banks were in that condition which they must assume after the waters had cut them away on each side.

Whether this rendered the ditch less useful to those assessed for its payment, was not a question before the court in the case of *Racer v. Wingate, supra*. The court, in that case, speaking of this very matter, said: "There was no issue involving such a question in the trial court. The simple issue for trial related to the question as to whether the work was done according to the plans and specifications under which the work was ordered. * * * Indeed, we are unable to conceive how such an issue could be formed in this case. Had this been a suit by the contractor against the drainage commissioner to recover compensation for his work, such an issue, perhaps, might have been tendered and tried."

And, again, in speaking of the collection of assessments, which is the matter under consideration in the case at bar, the court in *Racer v. Wingate*, referring to *Indianapolis, etc., G. R. Co. v. State*, and *Racer v. State, supra*, said: "Each of these cases was an action to recover assessments. It was held, and we think properly, that it was no defense to such an action that the work was not completed according to the plans and specifications and the order of the court, nor was it

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a defense to say that the commissioner and contractor were not prosecuting the work pursuant to the plans and specifications. * * * The collection of assessments to meet the expenses of constructing a public ditch is one thing, and determining the question as to whether it has been completed according to the order of the court is quite another and different thing."

Indeed, considering only what is said in the cases of *Racer v. State* and *Racer v. Wingate*, it must follow, as we think, that in the case at bar the court did not err in sustaining the demurrer to the complaint.

The restraining order heretofore issued by this court is, therefore, dissolved; and the judgment in the court below is affirmed.

Filed March 10, 1896.

NOTE.—The numerous decisions as to injunctions against execution sales, or other proceedings under final process, are collected in a note to *Parsons v. Hartman*, (Or.) 80 L. R. A. 98.

No. 17,723.

SMITH, TRUSTEE, v. WELLS MANFG. COMPANY ET AL.
AND SMITH, TRUSTEE, v. FINDLAY WINDOW
GLASS CO. ET AL.

APPEAL.—*Misjoinder of Parties.*—*Consolidated Actions.*—*Foreclosure of Mortgages.*—*Reversal.*—The joining of the plaintiff in one of two consolidated foreclosure actions as appellee, instead of appellant, in an appeal by the plaintiff in the other action from a judgment declaring both mortgages invalid, is ground for reversal, where both rely solely upon an assignment of error to the conclusion of law that both mortgages are invalid.

SAME.—*Dismissal by Clerk Under Court Rule.*—*Filing Brief.*—The failure of the clerk to comply with Supreme Court Rule 20, providing that if the appellant fails to file his brief within the time

144	266
147	284

144	266
160	438

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limited therefor, the clerk shall enter an order dismissing the appeal, unless the appellee shall have filed a written request that the cause be passed upon by the court, does not obviate the cause for dismissal; and the appeal will be dismissed in the event contemplated, although the clerk has failed in his duty.

SAME.—Filing Brief.—Computing Time.—In computing the time in which a brief may be filed after submission on appeal, the first day must be excluded and the last day included.

From the Hancock Circuit Court.

Hawkins & Smith and *O. B. Jameson*, for appellant.

R. A. Black, *J. N. Doty* and *Black & Pugh*, for appellees.

MCCABE, J.—Horace E. Smith, as trustee for a certain class of the creditors called the merchandise creditors of the Wells Manufacturing Company, an Indiana corporation, brought suit in said circuit court against said company and Henry Snow, its receiver, with leave of court, and the Findlay Window Glass Company, an Ohio corporation, to foreclose a mortgage on the entire property of said corporation, executed by said Wells Manufacturing Company to said trustee for the benefit of the class of creditors mentioned.

The Findlay Window Glass Company was made a defendant because it claimed to have a mortgage on the same property, executed by the same mortgagor to secure an alleged indebtedness from said Wells company to said Findlay company. About the same time the said Findlay company brought suit in the same court against said Wells Manufacturing Company to foreclose a mortgage executed, as alleged, by said Wells company prior to the alleged execution of the first mortgage mentioned. The whole property of the Wells company had been sold and converted into

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cash by its receiver and was in his hands, amounting to \$4,370.56. Both plaintiffs were seeking to fasten a lien on the fund in the hands of the receiver through a foreclosure of the mortgage of each, and each claiming that the mortgage of the other was invalid or inferior to the lien of the mortgage set up in the complaint of each.

Issues were formed at great length on the complaint, answers and cross-complaint in the first case, and by agreement in the trial court the two cases were consolidated, with a further agreement that all evidence should be admissible under an answer of general denial, which was pleaded in the second, that was admissible under the pleadings in the first.

A trial of the consolidated case by the court without a jury resulted in a special finding, on which the court stated conclusions of law that both mortgages were invalid and of no effect and that the trustee, Smith, was entitled to recover of the Wells company, \$11,581.07, and that the Findlay company was entitled to recover of the Wells company \$12,349.50, and that each of the plaintiffs should pay half of the costs.

Judgment was rendered on the finding pursuant to the conclusions of law, directing each judgment to be paid out of the assets in the hands of the receiver *pro rata*, and without any preference or priority between them and other creditors, if any.

The errors assigned are very lengthy, but all are abandoned in the briefs except those relating to the conclusion of law that both mortgages were invalid and of no effect. Each of the plaintiffs severally excepted to each of the conclusions of law.

In their argument here, they each assail that part of the one conclusion of law that holds such party's mortgage invalid, and they each, at great length and with earnestness, insist that that part of the con-

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clusion holding the mortgage of the other invalid was correct. It, therefore, appears that they were both precisely alike dissatisfied with the judgment which was against each of them precisely alike.

But Smith, trustee, alone appeals and makes the Findlay company an appellee along with the Wells company and its receiver, Snow.

The only difference between the error assigned by Smith, trustee, and that by the Findlay company, and not abandoned by each, is that Smith assigned error as appellant, and the Findlay company assigns as appellee, and by what its counsel is pleased to call cross-error, the conclusions of law and each of them. The assignments of error as to the conclusions of law of appellant and the supposed appellee, the Findlay company, are exactly alike.

It therefore appears that the Findlay company was just as proper and necessary an appellant in this appeal as Smith, trustee, and according to the repeated decisions of this court, the failure to make it such appellant was ground for dismissal of the appeal. *Gregory v. Smith*, 139 Ind. 48.

But this was a term time appeal, and therefore must be governed by the provisions of the act approved March 9, 1895, Acts 1895, p. 179. It provides: "That whenever a part of any number of co-parties against whom a judgment has been taken, shall appeal from such judgment to the Supreme or Appellate Court under the provisions of section 638 of the Revised Statutes of 1881, providing for term time appeals, it shall not be necessary to make such co-parties not appealing, parties to the appeal, and it shall not be necessary to name them as appellants or appellees in the assignment of errors, but they shall be bound by the judgment on appeal to the same extent as if they had been made parties. After any

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such appeal has been perfected, any co-party not joining therein, may, at any time, while such appeal is pending, and within one year from the date of the final judgment, assign errors for himself upon the record and have all the questions properly presented, decided by the court, and he shall have all the rights, in relation to such appeal, that he would have had if he had joined in the appeal originally."

Under this statute it is not necessary in a term time appeal to name co-parties, either as appellants or appellees, in the assignment of errors. And it authorizes any such co-party, while such appeal is pending, within one year from the date of the judgment, to assign errors for himself upon the record, and have all the rights in relation to such appeal that he would have had if he had joined in the appeal originally. Whether this authorizes such party, who ought to have been joined as an appellant, to assign errors for himself as appellee under the right to assign cross-errors, we need not now decide.

Assuming, without deciding that he may assign such errors under the name of either appellant or appellee, and under the title of assignment of errors or cross-errors, such party occupying the position held by the Findlay company here is nevertheless practically and in effect an appellant, because such party is seeking as much to reverse the judgment as the one who appears as the actual appellant.

But this appeal must be dismissed for another reason. The cause was submitted on September 23, 1895. On November 22, 1895, being the 60th day after submission, the appellant filed a petition asking an extension of thirty days beyond the time limited by the rules of this court in which to file appellant's brief. To this petition was attached the written consent to such extension by the apparent appellee, the Findlay

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company, but no other appellee consented to such extension. This court, without the knowledge that both parties to such agreement were really appellants, extended the time thirty days beyond that allowed for filing a brief for appellant, which makes ninety days from the submission of the appeal the appellant had in which to file his brief. His brief was not filed until December 23, 1895, the first brief filed in the cause. The date of the submission being September 23, 1895, we must exclude that day in the count and include the 23d day of December, the statute requiring the first day to be excluded and the last day to be included. R. S. 1894, section 1304 (R. S. 1881, section 1280). Excluding the 23d day of September we have seven days in that month, thirty-one days in October, thirty days in November, and twenty-three in December, making ninety-one days. Rule 20 of this court requires the clerk in case the appellant fails to file his brief within the time limited therefor, to enter an order dismissing the appeal, unless the appellee shall have filed a written request that the cause be passed upon by the court. No such request was filed.

Therefore, on December 22, 1895, the time for filing appellant's brief expired and the clerk of this court should have entered an order dismissing the appeal.

His failure to so dismiss the appeal did not remove or obviate the cause for such dismissal.

The appeal is therefore dismissed.

Filed March 10, 1896.

No. 16,739.

YOCUM, AUDITOR, v. FIRST NATIONAL BANK OF
BRAZIL.

TAXES.—*County Board of Review.—Time of Legal Expiration of Session.—How Computed.*—The rule for the computation of time fixed by section 1304, R. S. 1894, excluding the first and including the last day, unless the last day be Sunday, when it shall be excluded, governs in determining the legal expiration of the session of the county board of review, which, by section 8533, is limited to eighteen days, and, therefore, intervening Sundays must be included.

SAME.—*County Board of Review.—Void Order.*—An order of the county board of review of taxation, made after its legal session, as fixed by section 8533, R. S. 1894, had ended, is void.

SAME.—*Payment or Tender of Payment of Taxes Due.—Injunction.*—The payment or tender of payment of taxes admitted to be due, upon the basis of the original valuation of the capital stock of a bank, is not a condition precedent to an action to annul an order by the county board of review, under the statute, increasing the previous valuation, where the attack is directed against the increase as an entirety.

From the Clay Circuit Court.

J. A. McNutt and Matson & Luther, for appellant.

G. A. Knight and A. W. Knight, for appellee.

MONKS, J.—The board of review of Clay county, on the 25th day of July, 1891, entered an order increasing the valuation of appellee's capital stock \$16,000.00, and thereafter, on September 30, appellee filed a complaint against appellant in the court below and sought to have said order annulled and declared void, and to enjoin appellant from entering said increased assessment of \$16,000.00 upon the tax duplicate of said county and computing the tax levy

thereon, and for all general and equitable relief in the premises.

The ground stated in the complaint upon which relief is asked, so far as necessary to the determination of this cause, is as follows: That at the time the county board of review made the order in question its legal session, as fixed by law, had expired, the law limiting its session to eighteen days. See Acts 1891, p. 248, section 115 (R. S. 1894, section 8533). It is also alleged that section 8532, R. S. 1894 (section 114, p. 245, Acts 1891), provides: "That the board of review shall meet * * * * on the first Monday of July annually." That the day of meeting occurred in 1891 on the 6th day of July, and the legal session of the board expired on July 23d, but that the order increasing the valuation of appellee's stock was not made or entered until July 25, or two days after the board of review had any right or power to sit, and that said order was absolutely void."

Appellant demurred for want of facts, which demurrer was overruled and an exception reserved by appellant, who refused to answer, and the court rendered its decree adjudging that said order was null and void and enjoining appellant according to the prayer in the complaint. From this decree the appeal is taken, and in this court two errors are assigned, each of which questions the sufficiency of the complaint for want of facts.

The first objection urged against the sufficiency of the complaint is based upon the want of an averment that appellee has paid or tendered payment of the taxes "which the averments of the complaint confess the appellee is liable for."

This averment is not necessary in this form of action, which only seeks to set aside an alleged in-

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valid and void assessment. If the complaint were to enjoin the collection of taxes, part of which were legal and part illegal, the complainant would be required to pay or tender payment of the legal part, and this averment would be necessary before injunctive relief would be granted; but that is not this case, nor is this case within the principle or rule which requires such averment to be made. This action is to set aside and annul a particular order alleged to be void, whereby a specific sum, to-wit: \$16,000.00, it is averred was illegally added to the assessed value of appellee's property. The relief sought is confined exclusively to this assessment, which is alleged to be void, and wherever this is the case, this court and other courts have held that the averment of payment or tender of payment of the legal taxes need not be made.

In the case at bar it is claimed that no part or portion of the \$16,000.00, attempted to be assessed by the board of review, is legal—that it is all void and all should be held for naught.

The decisions and text writers abundantly sustain this view, that in such cases as this the averment of payment or tender is wholly unnecessary.

In the *Board, etc., v. Grurer*, 115 Ind. 224, Elliott, J., in speaking to this question, says: "But while we assert the rule"—as above stated—"we deny its application to this case. Here the plaintiff denies that any part of the assessment levied in June, 1884, is valid. She affirms, and the facts she pleads sustain her affirmation, that all of that assessment is void. She concedes nothing as to that assessment; on the contrary, her assault is directed against it as an entirety. Nor does the attack rest upon the theory that there was merely some irregularity in the proceedings of the officers; the theory of the attack is, that the assessment of 1884 was utterly void because there

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was an entire absence of jurisdiction. The appellee strikes successfully at the foundation and proves the invalidity of the entire assessment."

It is where some of the taxes sought to be avoided are legal that a tender of them is necessary before injunction will be granted to restrain the collection of those that are illegal. *City of Logansport v. McConnell*, 121 Ind. 416, at p. 419.

In this case appellee claims that the entire assessment of appellee's capital stock, made by the board of review in 1891, was illegal and void. The attack is upon the whole assessment, not a part of it. Appellees claim is that the whole assessment of \$16,000 made by the board of review is a nullity. *Hyland, Aud., v. Brazil Block Coal Co.*, 128 Ind. 335; *Hyland, Aud., v. Central Iron and Steel Co.*, 129 Ind. 68 (13 L. R. A. 515). "If the tax is void plaintiff need not offer to pay any part of his taxes; he is under no obligation to pay or tender anything." *Cooley Tax.*, p. 764, note 1; *Albany, etc., Bank v. Maher, Rec.*, 9 Fed. Rep. 884.

The remedy by injunction against an illegal and void tax is the proper one as this court has many times decided. *City of Delphi v. Bowen*, 61 Ind. 29, and the authorities therein cited; *Sunier v. Miller, Aud.*, 105 Ind. 393; *Smith v. Clifford*, 99 Ind. 113; *Cauldwell v. Curry*, 93 Ind. 363; *Bishop v. Moorman*, 98 Ind. 1, and authorities cited therein; *Riley v. Western, etc., Tel. Co.*, 47 Ind. 511; *Shoemaker, Aud., etc., v. Board, etc.*, 36 Ind. 175; *Town of Williamsport v. Kent*, 14 Ind. 306; *Toledo, etc., R. R. Co., v. City of Lafayette*, 22 Ind. 262; *Miles, Treas., v. Ray*, 100 Ind. 166; *Knight v. Flatrock, etc., Turnp. Co.*, 45 Ind. 134; *Cooley Tax.*, pp. 746, 747, 773; *Hobbs v. Board, etc.*, 103 Ind. 575.

"The owner of real estate may, by injunction, pre-

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vent a cloud being cast upon his title." *Thomas v. Simmons*, 103 Ind. 538; *Bishop v. Moorman*, *supra* (49 Am. R. 731); *Petry v. Ambroscher*, 100 Ind. 510.

Where a tax is a lien upon property, equity interferes to remove the cloud. *Cooley Tax.*, pp. 746, 747, also p. 761; *Schulenberg, etc., Lumber Co. v. Town of Hayward*, 20 Fed. Rep. 422; *Wells, Fargo & Co. v. Town of Dayton*, 11 Nev. 161.

A court of equity always lends its aid to remove a cloud upon title. It is conceded by counsel for appellant that if at the time the board of review increased the valuation of appellee's capital stock, it was not legally in session, such act was void and appellee was entitled to the relief given by the court below.

Section 8532, R.S. 1894, creating the county board of review, requires that it shall meet on the first Monday after the fourth day of July, and section 8533, R. S. 1894, provides that "the duration of the session of the board of review shall not exceed eighteen days." The legal session of the board in 1891 began on July 6 and the order of the board was made July 25. If Sundays are counted the order in question was made after the legal session had expired, but if Sundays are not counted then the legal session had not expired and the order was valid. The only question to be considered is whether Sundays are to be included or excluded in computing the length of the session.

In *English v. Dickey*, 128 Ind. 174 (13 L. R. A. 40), this court held that the provisions of section 6317, R.S. 1894, limiting the duration of the session of a board of commissioners when convened to try a contested election case to twenty days, is governed by section 1280, R. S. 1881 (section 1304, R. S. 1894), and that Sundays are excluded only as provided in that section; that

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if a special session was convened for said purpose on December 4, its existence of twenty days would terminate by operation of law on December 24.

The court said: "The rule for the computation of time in such cases is fixed by section 1280, R. S. 1881 (section 1304, R. S. 1894), and is that the term shall be computed by excluding the first day and including the last, and if the last day be Sunday, it shall be excluded. This, of course, includes intervening Sundays." Under this rule of excluding the first day and including the last, if the board of review met on July 6 its existence would terminate on July 24.

It was provided in section 11, 1 G. & H., p. 322, "that the State board of equalization should not remain in session more than ten days."

In *State, ex rel, v. McGinnis, Aud.*, 34 Ind. 452, this court held that in counting the ten days, intervening Sundays should be counted. The court said: "We think it quite clear, both on principle and authority, that the time thus limited constitutes the term during which the State board may act, and that when the time has expired their functions are ended, and that any act done by them afterwards is without authority of law and void. It is like a term of a court, the duration of which is fixed by law, in which case the court has no authority after the expiration of the time limited."

This case was followed and approved in the following cases: *Shoemaker, Aud., v. Board, etc.*, 36 Ind. 175 (182); *Jeffersonville, etc., R. R. Co. v. McQueen*, 49 Ind. 64 (73-75); *Newsom v. Board, etc.*, 92 Ind. 229 (232-233); *Hyland, Aud., v. Brazil Block Coal Co.*, 128 Ind. 335 (339).

It follows that the order of said board of review having been made on the 25th day of July, the day

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after its legal session, as fixed by law, had ended, the same was void.

The court, therefore, committed no error in overruling the demurrer to the complaint.

Judgment affirmed.

Filed March 10, 1896.

No. 17,505.

LOESCH ET AL. v. KOEHLER.

EVIDENCE.—Damages.—Value of Horses.—Evidence as to the value of horses for the special purpose for which they were used is admissible under an allegation of general damages, in an action for the wrongful killing thereof, as the evidence is of general and not special damages.

SAME.—Value of Horses for Special Purpose.—Damages.—Harmless Error.—If the admission of evidence as to the value of the particular horses killed, with reference to their use for a particular kind of work, in an action for the wrongful killing thereof, is erroneous, the error is harmless, where the amount of the verdict is but a fair average of the general market-value of horses, as testified to, and is less than any valuation for the horses, with reference to the special use.

DAMAGES.—Measure Of.—Wrongful Killing of Horses.—Evidence.—The measure of damages for the wrongful killing of horses fitted for a special kind of work, is the market-value in the locality of horses fitted for such work, if there is such a market-value, and not the general market-value of horses.

APPELLATE PROCEDURE.—Notice.—Reserved Questions of Law.—No question as to the sufficiency of the notice given to the trial court of appellant's intention to reserve and present specified questions, under section 642, R. S. 1894, arises, where such court has, pursuant to the notice, fully and correctly prepared a special bill of exceptions so as to present briefly and distinctly each of such questions.

CONSTITUTIONAL LAW.—Killing of Injured, Abandoned or Diseased Animals.—Notice.—Humane Society.—Section 2202, R. S. 1894, authorizing any agent of any society for the prevention of cruelty to animals to kill any animal found neglected or abandoned, and

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which is injured or diseased past recovery, or by age has become useless, is unconstitutional as depriving the owner of property without due process of law, so far as it permits such killing without notice to him. (See note at end of opinion.)

From the Allen Superior Court.

T. E. Ellison, for appellants.

Randall & Doughman, for appellee.

HACKNEY, J.—Action and recovery by the appellee against the appellants for causing the death of two of his horses. The case comes to this court on reserved questions of law under section 630, R. S. 1881 (section 642, R. S. 1894). The appellee denies the sufficiency of the record because of the general character of the notice given to the lower court of the intention of the appellants to so reserve and present such questions. The character and the sufficiency of the notice are, as a general rule, questions for the trial court, the object of the notice being to enable that court to prepare the special bill of exceptions so as to disclose, briefly and distinctly, such part of the record or proceeding as will present to the court of review the particular question involved. No doubt the character and the sufficiency of such notice may become questions for the court of review, as when the lower court has deemed the notice insufficient to comprehend all of the rulings sought to be presented, but where, as in the present case, the lower court has, pursuant to the notice, fully and correctly prepared the special bill of exceptions so as to present briefly and distinctly each question urged for reversal, there is, properly, no question as to the sufficiency of the notice. The case of *Shugart v. Miles*, 125 Ind. 445, instead of supporting the appellee's view of this question, sanctions the rule we have stated.

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The appellants sought to justify the killing by the provisions of section 334, Elliott Supp. (section 2202, R. S. 1894), which are as follows: "Any sheriff, constable, marshal, policeman or agent of any society for the prevention of cruelty to animals, may kill or cause to be killed any animal found neglected or abandoned, and which, in the opinion of three reputable citizens, is injured or diseased past recovery, or, by age, has become useless." The court instructed the jury that the justification was not complete unless it was shown that the appellee had notice of the "seizure and the investigation," and unless "said horses were in truth and in fact so diseased or injured as to be past recovery, or, by reason of age, were useless." The evidence showed that the horses were in charge of a youth who was engaged in hauling brick with them for the appellee; that the appellants were officers and agents of the "Fort Wayne Humane Society for the Prevention of Cruelty to Animals and Children," and that the appellants, without notice to the appellee, procured the opinion of three reputable citizens that said horses had been neglected and abused and were injured and diseased past recovery, and had, because of their age, become useless; that with no malice and acting upon such opinion they caused said animals to be killed. As to whether said horses had been injured or diseased beyond recovery or were, by age, useless, the evidence was in conflict, and we may assume that if this was a proper issue the jury found the weight of the evidence in favor of the appellee.

It will be observed that the requirements of the instruction above quoted are not within the letter of the statute urged in justification of the acts complained of, and it is asserted by counsel for appellants and conceded by the counsel for the appellee, that it was the theory of the trial court that without such notice to

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the owner, said statute would be unconstitutional. Argument has been made also as to whether the legislature did not intend that the statute should apply only to animals running at large and abandoned or neglected, and not as permitting one's team to be unhitched from the wagon, where he may have left it for the moment, and, by summary proceeding, have it killed. We take it that it can matter little which interpretation is found to be correct, since upon either view the destruction of the animals is provided for without notice, actual or constructive, to the owner. By the fundamental law it is provided that no person shall be deprived of his property without due process of law. Does the statute under consideration violate this guaranty to the citizen?

The confiscation and destruction of the animals cannot be justified as a penalty for the violation of the law against cruelty to animals, as under the statutes of some states, where it is provided that, as a part of the penalty, the property employed in an unlawful trade or illegal act may be seized and destroyed. Such statutes are those authorizing the destruction of gambling devices, intoxicating liquors, fish nets, traps, etc. In that class of cases it is not only a part of the prescribed penalty, but it is held to be a necessary element of and to rest upon a judgment of guilt and of forfeiture. *Ieck v. Anderson*, 57 Cal. 251; *Lowry v. Rainwater*, 70 Mo. 152; *Greene v. James*, 2 Curt. 187; *State v. Robbins*, 124 Ind. 308 (8 L. R. A. 488). See also *State v. Miller*, 48 Me. 576; *State v. Snow*, 3 R. I. 54; *Weller v. Snover*, 42 N. J. L. (13 Vroom) 341.

Though the police power may uphold statutes of that nature, the statute before us does not rest upon the exercise of that power. It does not extend the right as an element of punishment to the owner of the

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animals killed and wholly omits the essential element of notice, included in the class of cases to which we have referred.

Nor can it be maintained that, as an exercise of the police power, it is a method of quarantine, since it does not make the destruction depend upon the existence of infectious or contagious disease, or other conditions affecting public health or comfort.

The forfeiture and destruction authorized by the statute is not a part of the penalty for the offense of cruelly using the animals, but it is permitted simply because the animals may be injured or diseased past recovery, or, from age, may be useless, and where the owner may have neglected or abandoned them.

In *State v. Robbins, supra*, this court said: "It is fundamental that no person can be deprived of any article, which is recognized by the law as property, without a judicial hearing, after due notice. No degree of misconduct, or wrong, can justify the forfeiture of the property of a citizen, except in pursuance of some judicial procedure, of which the owner shall have an opportunity to contest the ground upon which the forfeiture is claimed." In *Kuntz v. Sumption*, 117 Ind. 1 (2 L. R. A. 655), it was said: "That notice is required in all cases where individual property rights are involved, and the matter is not one of pure discretion, has been again and again decided by our own and other courts. *Strasser v. City of Ft. Wayne*, 100 Ind. 443; *Troyer v. Dyar*, 102 Ind. 396; *Jackson v. State*, 103 Ind. 250; *Johnson v. Lewis*, 115 Ind. 490; *Board, etc., v. Gruver*, 115 Ind. 224, and cases cited."

In *Lourey v. Rainwater, supra*, it is said: "Forfeitures of rights and property cannot be adjudged by legislative acts, and confiscation without a judicial

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hearing after due notice would be void as not being due process of law."

In *King v. Hayes*, 13 Atl. Rep. (N. C.) 882, a case involving the exact question before us, it was said: "We are of opinion that so much of the provisions of Rev. Stat. Ch. 124, section 42, as allowed the defendant to condemn, conclusively fix the value of, and destroy the defendant's horse, without any notice, actual or constructive, to the owner, in order that he might be heard, is in violation of the fundamental law, which prohibits any person being deprived of his property without due process of law. *Dunn v. Burleigh*, 62 Me. 24. Such have been the adjudications even in the regard to the destruction of intoxicating liquors intended for unlawful sale. *Fisher v. McGirr*, 1 Gray, 1; *Lincoln v. Gray*, 27 Vt. 355." See also *Pearson v. Zehr*, 138 Ill. 48, where it is held that the slaughter by a live stock commission of animals supposed to be suffering from contagious disease does not conclude the owner from recovering if it cannot be shown that such animals actually had such disease, and it was said: "To permit the commissioners to determine, *ex parte*, that some of the horses had the glanders and that the others had been exposed thereto, and to hold that determination a justification for slaughtering the horses, without imposing upon the appellants the burden of establishing affirmatively the actual existence of such disease and such exposure, would not be a valid exercise of the police power of the State, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law."

A like decision was rendered in *Miller v. Horton*, 152 Mass. 540 (10 L. R. A. 116), and it was there held that in the absence of disease constituting a nuisance the legislature could not extend the right to slaughter

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without notice and an opportunity to the owners to be heard.

In holding that the statute is invalid in permitting the destruction of the property of a citizen without due process of law, we would not be understood as holding that the question as to the existence of the statutory cause for destruction must be submitted to a court of justice, nor that a notice, such as is required in ordinary civil or criminal proceedings in such courts, is necessary, but some notice and a hearing before some tribunal must be provided. The action of the circuit court in adding to the terms of the statute, by instructing as to the necessity for notice, it is conceded, could not remedy the omission from the statute. The finding of the jury negatived, the existence of notice, and, under the instructions given, presents the question as to the validity of the statute without notice.

The judgment is affirmed.

Filed September 18, 1895.

ON PETITION FOR REHEARING.

HACKNEY, C. J.—The verdict and judgment in favor of the appellee were for \$75. The record discloses that the appellee and one Ormiston testified as to the value of the horses, “after having given evidence that they knew the general market value of horses, such as were described in the complaint in controversy in this action.” The appellee testified that such market value was from \$40 to \$45 each, while Ormiston testified that it was from \$20 to \$25 each. Each of said witnesses was then asked, over the objection and exception of the appellants, to answer “What, in your opinion, was the value of the horses in question as brick yard horses?”

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To this question Ormiston answered that they were worth from \$75 to \$80 each, and the appellee answered that they were worth from \$100 to \$110 each.

It is urged that the objection to the above question should have been sustained: first, because the evidence was of special damages and not of general damages, the complaint alleging only general damages, and, second, that the measure and limit of damages was the general market value. Of the first of these objections we think counsel is certainly in error in supposing the evidence to present a question of special damages. The author cited, Sutherland on Damages, vol. 1, sections 418, 419, lays down the rule that "Under a general allegation of damage the plaintiff may prove and recover those damages which naturally and necessarily result from the act complained of; for the law implies that they will proceed from it. These are called general, as contradistinguished from special, damages which are the natural but not the necessary consequences." See many authorities there cited. The value of the horses was naturally and necessarily the loss resulting to the appellee. That loss was the direct and essential result of the act of the appellants, and was not collateral or consequential. The loss of employment until a new team might have been purchased, and the like would have been an element of special damages. The case of *Teagarden v. Hetfield*, 11 Ind. 522, and cases following it, cited by appellants' counsel, are in harmony with this view. We do not regard the question as one of special damages, but we do consider the second proposition above stated as presenting the real inquiry, and that is as to the method of proving the loss sustained by the appellee. That loss, it is conceded, was the value of the horses at the time they

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were killed, the value of the particular horses, not the value of horses generally. "The general market value of horses" was not the true test. If there was a market value in that locality of horses such as these were that would have been a proper test. It is a matter of common observation that there are numerous and varied grades of horses, and that these grades have their market values. The size, age, speed, color, build, degree of soundness, breeding, training, gentleness, etc., mark and vary the grades and values. The uses to which the horses in question were adapted and had been employed were elements of importance in determining the classes or grades to which they belonged, and the class or grade necessarily controlled the value or market price. See *Nosler v. Chicago, etc., Ry. Co.*, 73 Iowa, 268; *Farrell v. Colewell*, 30 N. J. L. 123; *Central, etc., Ry. Co. v. Nichols*, 24 Kan. 242.

There was no description of the horses given by the complaint and they were referred to only as "a black mare and one gray horse of the value of \$100 each." It must be presumed, therefore, that the question so objected to was made pertinent by testimony as to the character and uses of the team for brick yard purposes. The special bill of exceptions does not disclose the existence or non-existence of other evidence of value, or as to the manner in which the particular inquiry in review arose. It may be observed, however, that the jury did not accept and act upon the evidence objected to, considering it apart from other evidence and upon the presumption that there was no other evidence than the two classes of estimates mentioned. Seventy-five dollars, the amount of the verdict, was less than any valuation by either witness for the two horses as "brick yard horses." That sum was but a fair average of the "general market value,"

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as testified by the two witnesses. It was, therefore, as favorable to the appellants as they could have asked, upon the evidence disclosed by the record.

If the ruling of the court in permitting the witnesses to answer the question in review was erroneous, it was clearly harmless, and does not constitute reversible error.

The petition is overruled.

Filed March 11, 1896.

NOTE.—As to the right to compensation for property destroyed in abating a public nuisance, see note to *Orlando v. Pragg*, (Fla.) 19 L. R. A. 196.

No. 17,600.

BACKER ET AL. v. EBLE ET AL.

APPEAL.—*Will Not Lie from Judgment Rendered in Vacation.*—

An appeal will not lie to the Supreme Court from a purported judgment rendered without statutory authority in vacation, as such purported judgment is in legal contemplation no judgment at all, but at most a special finding.

From the Perry Circuit Court.

S. K. Connor and *I. S. Bramel*, for appellants.

H. A. Mattison, *F. B. Posey* and *A. J. Clark*, for appellees.

MCCABE, J.—The transcript in this case presents a curiosity. The appellants sued the appellees for possession of a piece of ground in the town of Troy, in the county of Perry. After the issues were made at the May term, 1894, the cause was continued, as the transcript states, without any showing that the cause

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was submitted for trial to either court or jury. The transcript shows that in vacation between the May and August terms, to-wit: on the 29th day of June, 1894, the judge of the Perry Circuit Court filed a paper called a special finding and conclusions of law, and following the conclusions of law in such paper is a formal judgment for the defendants pursuant to the conclusions of law, and below the judgment, on such paper, the judge's signature is appended, and that is the only signature to the special finding and conclusions of law. This paper does not show any submission of the cause for trial. There does not appear to have been any action taken on the finding in term, nor was any judgment rendered other than that already mentioned.

At the following August term, the appellants moved for judgment in their favor on the special finding, which was overruled; then they moved for a new trial, and in that motion notified the court, which notice formed a part of the motion, that they intended to take the cause to the Supreme court on the bill of exceptions only, but no bill of exceptions was ever filed. The motion for a new trial was overruled. The plaintiffs at the same term excepted to the conclusions of law.

They have appealed and assigned said rulings for error.

And, strange to say, while the prayer of appellants' assignment of error is that the judgment be reversed, they make the point in their brief that the record shows the rendition of no judgment.

We can neither reverse nor affirm unless the record shows the rendition of a judgment.

And stranger still, appellants cite in support of their contention that a judgment cannot be entered in vacation, *Passwater v. Edwards*, 44 Ind. 343, and

Backer et al. v. Eble et al.

Mitchell v. St. John, 98 Ind. 598, to which we add *Newman v. Hammond*, 46 Ind. 119; *Ferger v. Wesler*, 35 Ind. 53.

Under these decisions the supposed judgment contained in the special finding was void because not rendered in term time. This is so because when the law authorizes or contemplates the doing of a judicial act, it is and must be understood to mean that the court in term must do it, and the judge in vacation cannot unless the power is expressly conferred upon him by statute. *Ferger v. Wesler, supra*. There is no statutory provision authorizing a judge to render judgment in vacation, as was attempted to be done in this case. The supposed judgment, being void, is as if it had been rendered by some private unofficial gentleman, and therefore is as if it had never been rendered at all.

There can be an appeal only from a final judgment, except in a few cases in which appeals are authorized from certain interlocutory orders. *Thomas, Admr., v. Chicago, etc., Ry. Co.*, 139 Ind. 462, and authorities there cited. This appeal does not fall within any of such exceptions.

It is true this court has often held that an appeal will lie from a void judgment. But this case does not fall within the purview of those decisions.

The thing called a judgment here does not purport to be the judgment of a court. The most that can be said of it is that it is a special finding on which no judgment has been rendered by the court.

It has been held by this court that an appeal will not lie from a finding without a judgment thereon. *State, ex rel., v. Brown*, 44 Ind. 329. See also *Sare v. Butcher*, 141 Ind. 146. And so it was held in *Gray v. Singer, Admr.*, 137 Ind. 257, that the appeal

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would not lie, although there was a finding and the bill of exceptions recited that a judgment had been rendered on the finding, though there was no showing that such judgment had been entered in the order book.

Appellants' contention having been established that no judgment has been rendered in this case, it follows that their appeal must be and is dismissed.

Filed March 12, 1896.

No. 17,633.

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144	290
151	664

144	290
155	668

144	290
161	293

144	290
167	121

CONTINUANCE.—Absent Witness.—A sufficient excuse for the want of further effort by defendant to secure the attendance of a witness returned "Not found," during the eight days between the return of the writ and the trial, is not shown by the statement in an affidavit for a continuance that his attorneys made inquiry to find out if such subpoena had been served and returned, and to find the subpoena, but were unable to obtain such information or find the subpoena until the day of trial, where it is not shown when or of whom the inquiries were made.

SAME.—Sickness of Defendant.—Defense.—Criminal Law.—A continuance in a criminal case, on the ground that owing to the sickness of defendant he was prevented from making a proper preparation for his trial, is properly refused, where he fails to disclose by a plain and consistent statement facts preventing the preparation for trial.

INSTRUCTIONS TO JURY.—Joint Assignment.—The correctness of any one of the instructions covered by a joint assignment of error, or the incorrectness of any one of the requested instructions covered by a joint assignment to refusals to instruct, renders error in the giving of any particular instruction, or the refusing of any particular request. unavailable on appeal.

APPELLATE PROCEDURE.—Cause for New Trial.—How Established.—The truth of an alleged cause for a new trial must be established in the Appellate Court by the bill of exceptions, or by affidavits brought into the record by such bill.

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SAME.—Issue of Fact.—An issue of fact determined by the trial court upon conflicting evidence, is conclusive upon the Supreme Court.

SAME.—Abuse of Discretion.—Review.—A clear and strong showing of a gross abuse of discretion to the manifest injury of the party complaining, is essential to the review upon appeal of the exercise of a purely discretionary power by the trial court.

CHANGE OF VENUE.—Local Prejudice.—Discretion.—Criminal Law.—The granting of a change of venue in a criminal case, on the ground of the existence of local prejudice and excitement, is within the sound discretion of the trial court, under section 1840, R. S. 1894.

NEW TRIAL.—Misconduct of Jurors.—Criminal Law.—Inspecting Locus in Quo.—Experiments.—A new trial will be granted in a criminal case, where a number of the jurors, in the absence of, and without the consent of, either the court or the parties, went to the scene of an alleged occurrence material to the questions involved, and there made experiments, and conversed with witnesses with reference to such alleged occurrence, although they filed affidavits that their visits were for mere idle curiosity, and that their experiments and observations did not enter into their deliberations, nor control to any extent their verdict.

From the Boone Circuit Court.

P. H. Dutch, B. S. Higgins and A. J. Shelby, for appellant.

W. A. Ketcham, Attorney-General, for State.

HACKNEY, C. J.—The appellant was indicted in the court below for an assault and battery with the intent to commit murder in the first degree. He was tried, convicted, and his punishment assessed at eleven years in the State's prison and a fine in the sum of \$50.

There was a change from the regular judge and the proceedings assigned as error were before the Hon. Joshua G. Adams as special judge. One of the assignments of error urged by counsel for the appellant is that the trial court erred in overruling his motion for a continuance. The motion specified two causes; the absence of witnesses who were alleged to reside in

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Marion county, Indiana, and the sickness of the appellant, which prevented a proper preparation for his trial.

The affidavit for a continuance includes a subpoena issued to the sheriff of Marion county on the 9th day of January, 1895, directing the appearance of the witnesses therein named on the 21st day of January, 1895. This writ was returned on the 13th day of January, 1895, the witnesses named not having been found. The want of further effort to secure the attendance of said witnesses is sought to be excused by the following showing: "That defendant's said attorney made inquiry to find out if said subpoena had been served and returned and to find said subpoena, but was unable to obtain such information or find such subpoena or where said subpoena was until the noon adjournment of said court at this day," when the clerk informed him that one of the appellee's attorneys had the writ. Who it was that appellant's counsel made inquiry of, and when such inquiry was made do not appear. Conceding the truth of the showing, the only inquiry by counsel may have been of the defendant and may not have been made until the morning of the day set for the trial, January 21, eight days after the return. He was required to show diligence to procure the attendance of the witnesses, and this would not appear without showing an inquiry of the officer whose duties would include a knowledge of the return of the writ and that such inquiry was seasonably made. The affidavit states that the appellant was confined in jail from December 13, 1894, "until the — day of December, 1894;" that "he had no means himself with which to employ counsel to defend him and was unable, on the 14th day of January, 1895, to make arrangements and employ counsel necessary for his defense; that through ex-

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posure in coming to Lebanon to make such arrangements with his counsel, he took a severe cold and had a chill, aggravating the sickness from which he was suffering at the time, and for which he was being treated at the time by Dr. J. N. Parr; * * * that by reason of said sickness this defendant was unable to further visit his attorney or prepare his case for trial," and did not give his attorneys the names of a number of his witnesses until the morning of the day set for the trial. It was shown, also, that he was released from custody, upon bond, "on the — day of December, 1894," and was rearrested and returned to jail January 18, 1895. Dr. Parr's affidavit accompanied that of the appellant and disclosed "that on the 4th day of January, 1895, he was called to see" appellant, and "found him suffering with ———, and has since been under treatment, and his condition was such that he could not safely have gone out of doors; that he advised him to remain indoors while under treatment" with "bichloride of mercury."

We do not learn from this showing how long he was first confined in jail nor why he did not call and consult counsel during that confinement. It does not appear that means were not at his command, for the employment of counsel, at any time, and the statement that "on the 14th day of January, 1895," he was unable to "make arrangements and employ counsel necessary for his defense" does not exclude the existence of available means and ample ability at other times to employ counsel. Nor does it appear that, though he resided several miles from the county seat, counsel did not visit and consult with him daily about his defense. Nor does it appear that he had no opportunity, after rearrested and before the morning set for the trial, to advise his counsel of a "number of witnesses" he desired. By some means action was

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taken in his behalf, looking to the trial, as early as January 9, when subpoena was issued, and some method had then been secured of communicating the names of the witnesses included in that writ. His condition "on the 4th day of January, 1895," elicited advice to remain indoors while under treatment. How long it continued to be dangerous for him to leave the house is not shown. It is evident, we think, that the burden of disclosing, by a plain and consistent statement of facts, preventing the employment of counsel and the preparation for trial, was not discharged. There was no error in overruling the motion for a continuance.

Another contention of counsel is that the trial court erred in refusing a change of judge, after that already referred to, and further, that the special judge was guilty of misconduct in characterizing the affidavit for such change as "rank perjury." This contention is not properly supported by the record. The affidavits intended to show the abuse of discretion and the alleged misconduct of the judge, are not only unsupported by a bill of exceptions, but the bill purporting to contain them is not signed by the judge, for the expressed reason that the facts therein stated were untrue. It is well recognized practice that the truth of an alleged cause for a new trial must be established by the bill of exceptions or by affidavits brought into the record by such bill. Elliott App. Proced., section 817, and authorities there cited.

Complaint is made, also, of the action of the trial court in refusing to change the venue of said cause from Boone county. The application for the change was supported by numerous affidavits of the existence of local prejudice and excitement, and many counter affidavits were filed and considered by the court. From the affidavits on behalf of the appellant it ap-

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peared that the crime had excited considerable comment by the press and the people; that it was feared the appellant might be lynched; that the sheriff, entertaining this fear, had removed the appellant to the Clinton county jail, and that the house of a woman in Zionsville, the place where the shooting occurred, had been stoned and she had been threatened, it was alleged, because of her friendship for the appellant and her promises of assistance in his defense. Each of such affidavits contained the expressed opinion of the affiant that a fair and impartial trial could not be had in Boone county.

The counter affidavits, made by residents in and near Zionsville, were to the effect that the affiants were acquainted with the expressed sentiments of the people of Boone county and that the appellant could obtain a fair and impartial trial of the cause in that county.

The granting of the change of venue was not imperative, but rested within the sound discretion of the court. R. S. 1894, section 1840 (R. S. 1881, section 1771); *Reinhold v. State*, 130 Ind. 467; *Spittorff v. State*, 108 Ind. 171; *Masterson v. State*, 144 Ind. 240; *Ransbottom v. State*, 144 Ind. 250. An issue of fact determined by the trial court upon conflicting affidavits is conclusive upon this court. *Schnurr v. Stults*, 119 Ind. 429. The discretion vested in the trial court was not implied, but was given by the express language of the statute. It must be understood that where a purely discretionary power is exercised it cannot be reviewed unless the complaining party shall show clearly and strongly that the court grossly perverted its power to his manifest injury. Elliott App. Proced., sections 597-605; *Detro v. State*, 4 Ind. 200; *Gordon v. Spencer*, 2 Blackf. 286. A mere error in judgment, such as may arise

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from not properly ascertaining upon which side of the question lies the preponderance of the evidence, is not ground for such review.

That there had been a violent demonstration of feeling against the woman mentioned was clearly shown, but that this was because she was expected to assist the appellant in his defense was given merely as the opinion or conclusion of those whose affidavits were filed. If we have not misinterpreted the evidence upon the trial, it may be doubted whether that conclusion is nearer the true one than that she was blamed, by those guilty of that violence, for exercising an influence over each of the parties to the crime charged, which brought on the conflict between them. However, it does not appear that the sheriff's action was because of any actual threats of violence towards the appellant. The difference of opinion, between those making affidavits on either side, as to whether the appellant could obtain a fair and impartial trial would clearly have justified the court's action. But it must not be supposed that the question of discretion was one depending alone upon the preponderance of the evidence given by affidavit. If that were the question there would be no discretion to be exercised, but the judgment of the court would be narrowed to the issue presented by the affidavits. There are few cases that excite special public interest, where conflicting views and sentiments could not be presented upon the question of a fair and impartial trial. The court should exercise a careful discrimination between the natural and necessarily conflicting views of the friends and the enemies of the accused, and should bring to bear that knowledge which comes to every man of observation and experience of the varying and changing views of the masses in times of excitement, and again when pas-

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sion has had an opportunity to subside. The man who presides over a judicial tribunal cannot, and should not, as a judge, exclude from his mind, in the exercise of a purely discretionary matter, depending upon a condition of public sentiment, all knowledge and all impressions coming to him as a man. While he may be aided and enlightened often by affidavits, as shown in *Anderson v. State*, 28 Ind. 22, that is not the only source of information and judgment. If it were, it is plain, as we have already shown, that a wide and unlimited discretion given by the statute would be narrowed to a question depending upon the weight of the evidence.

We find here no case requiring a review for manifest perversion of discretion.

Thirty-nine causes were assigned by the motion for a new trial, many of which have not been presented in argument, and some of which are presented only by suggestions as to their places in the record and without the statement of reasons or authority supporting them. The assignment as to the giving of instructions is joint as to all given, and that as to the refusal of appellant's instructions is joint also. If, therefore, any one given was correct, and if any one refused was incorrect or was covered by any given, there would be no available error. *Elliott App. Proced.*, section 791; *Wallace v. Exchange Bank*, 126 Ind. 265; *Ohio, etc., Ry. Co. v. McCartney*, 121 Ind. 385; *State, ex rel., v. Gregory*, 132 Ind. 387. The objections urged to the instructions in argument are not specific, but are too general to suggest an error with reference to any one of them. It is not claimed, however, that all given were wrong, and that all asked were correct and were not covered by any that were given.

The principal issue upon the trial was upon the appellant's special plea of insanity at the time of the

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commission of the alleged crime. Upon this issue there was evidence of an attempt, on the part of the appellant, while confined in jail, to commit suicide by hanging. At the close of the testimony in the case, and upon the adjournment of the court in the evening, eleven of the jurors went to the jail and viewed the chamber where it was claimed said attempt was made. While there they procured the wire with which the hanging was attempted, and some of their number, in the presence of the others, discussed, with the prisoners who had given evidence upon the trial as to said attempt, the questions as to the excessive length of the wire, affording an opportunity for the appellant's feet to reach the floor while it was about his neck, and the ease with which he could have reached the side walls with his hands and feet and thereby saved his life. Testing the length of the wire, some of the number held or fastened the wire as it was said by the prisoners to have been fastened at the time of said attempted suicide, while another stood under it. This conduct of the jurors was without the knowledge or consent of the court, or either of the parties, and was unknown to the defendant until after the verdict. The facts are brought into the record by the affidavits of said prisoners filed in support of the appellant's motion for a new trial, and, as we have stated them, are not controverted. The eleven jurors, however, filed affidavits that their visit to and observations at the jail were from mere idle curiosity; that they were not requested by another to do what they did, and that the observations and experiments made by them did not enter into their deliberations nor control to any extent their verdict. In this State the right of the jury to view the place where any material fact occurred is given by statute and is to be exercised "Whenever, in the opinion of the court and

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with the consent of all parties, it is proper." R. S. 1894, section 1896 (R. S. 1881, section 1827). At such view the place is shown by some one appointed by the court for that purpose and "While the jury are thus absent, no person, other than the officer and the person appointed to show them the place, shall speak to them on any subject connected with the trial." At each adjournment the jury were admonished by the court that it is their duty not to converse among themselves nor to suffer others to converse with them on any subject connected with the trial, until the cause is finally submitted to them. R. S. 1894, section 1895 (R. S. 1881, section 1826).

It would appear, therefore, that the conduct of the eleven members of the jury on the occasion in question was a gross violation of duty, not only in viewing the place mentioned, but in talking to others and permitting others to talk with them upon a subject connected with the cause. The abuse of their privilege was greater from the fact that their communications were with witnesses in the case, upon whose sworn evidence, given upon the trial, the facts or occurrence in question became material. One of these witnesses made the remark to the jurors which excited their suspicion that the wire was too long, and induced the experiment to which we have referred.

It has been settled in this State that the view contemplated by the statute does not constitute evidence, but simply enables the jury to apply to the location the evidence received from the witnesses. *Shular v. State*, 105 Ind. 289, and authorities there cited. In the case just cited, distinguishing between the mere view of the location and the reception of evidence, it was suggested, with reference to *State v. Bertin*, 24 La. Ann. 46, that explanations, by a witness, made of a diagram, while viewing the location, were evidence

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given in the absence of the accused. In *Erwin v. Bulla*, 29 Ind. 95, it was held that when the jury made the statutory view the injunction against conversing upon the subject of the trial was an important requirement and should be carefully observed, and the verdict was set aside because of a statement made by one of the witnesses during the view and in the hearing of the jurors.

In *Heffron v. Gallupe*, 55 Me. 563, it was well said that "The theory of our jury trials is that all parties and witnesses are to be heard in open court, in the presence and under the direction of the presiding judge. The law is extremely tenacious of this cardinal doctrine, and looks with distrust and aversion upon any departure in practice from its strictness. The oath of the juror is to decide according to the law and evidence given to him—given to him according to the rules of evidence in open court and with the parties face to face. It surely cannot mean evidence given to a jurymen by a party outside of the court room, to be read and pondered upon in secret, before joining his fellows in deliberation on the verdict."

In the case of *Tyrrell v. Bristow*, 1 Alcock & Napier Rep., p. 398, it was said: "It is highly reprehensible in jurors to endeavor to procure *ex parte* evidence out of court, and thereby influence the minds of the other jurors in consulting upon the verdict. Their duty is sacred and should be most conscientiously discharged, which can only be effected by their keeping their minds free and clear of all representations which do not grow out of the evidence adduced in court. Evidence should not be acted upon, which all the jury had not originally an opportunity of acquiring in the legitimate way, which is prescribed and sanctioned by the rules of law and which should be in the presence of the parties or their professional agents."

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It is true that this was said in a case where some of the jurors viewed the location in question and the observations were regarded as evidence. Though we may differ from the conclusion that the view is evidence, we cannot differ in the conclusion reached when evidence is obtained out of court. The evidence upon which any juror acts should be the evidence upon which all of the panel may act.

In *Deacon v. Shreve*, 22 N. J. L. 176, pending the trial some of the jurors visited the *locus in quo* and examined a spring about which witnesses had testified, and it was said, in part, that "Laying aside any consideration as to the action of the plaintiff himself, these jurors, in the absence and without the knowledge of the defendants, by preconcerted arrangement, met the friends and witnesses of the plaintiff and privately conferred with them in regard to matters which were considered to have an important bearing on the case. It was nothing less than an *ex parte* examination of evidence in the cause, the influence of which we cannot know, nor, indeed, ought we to inquire as to it. However inadvertent the conduct of the jurors may have been, who were perhaps drawn into it by the pretence that the evidence of the two witnesses, as to the spring, had been misrepresented, still it was gross irregularity, which, if permitted, would destroy all confidence in the purity of jurors, and in the impartiality and fairness of their verdicts. Though verdicts should not be set aside on slight grounds not likely to be prejudicial to a party, yet certainly the welfare and security of the community require us to interfere in a case like this."

In Thompson & Merriam on Juries, section 417, it is said: "Inspection by triers of fact is recognized as one of the modes of producing evidence, or rather of dispensing with it; and while a court will, in proper

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cases and under proper safeguards, permit the jury to visit the *locus in quo*, to inspect the scene where a particular thing is alleged or shown to have been done, or the weapon with which a crime is alleged to have been committed, and the like, yet it is never tolerated that jurors should make such inspections of their own accord. It is well settled that jurors must decide cases upon such evidence as is produced before them by the parties to the litigation, and that they cannot go in search of evidence privately, or act upon evidence thus obtained." See also sections 353 and 354 of the same work. In *Hayward v. Knapp*, 22 Minn. 5, a new trial was ordered because of statements, pending a view of the *locus in quo*, made by one accompanying the jury by order of the trial court for the purpose of pointing out the places.

If we have reached a correct conclusion in holding that the statements of persons at the jail, at least one of whom was a witness to the occurrence in question, were evidence, it was the privilege of the accused to meet the witnesses face to face and by counsel to be heard in a public trial with reference to such evidence. Section 12, Art. 1, Ind. Const.; R. S. 1894, section 58.

The case of *Luck v. State*, 96 Ind. 16, presented the misconduct of a bailiff in charge of a jury who, in walking with them, took them near the place of the homicide. This court said: "The conduct of the bailiff, in walking with the jury about the city and passing the place of the homicide, was reprehensible in the extreme, and for it he was deserving of punishment. Such conduct upon the part of a careless or perverse bailiff often makes a new trial necessary, greatly to the prejudice of the administration of justice. * * * But with respect to such misconduct the law is well settled that it will not authorize a new

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trial where, as in the present case, it is shown that the jury were not subjected to any improper influences, and were not in any way attempted to be tampered with, and where the verdict is clearly right upon the evidence." In the present case, however, the misconduct was that of the jurors in violating the injunction of the court and in not only making a view of the location without the permission of the court or the consent of all the parties, but in conversing with and permitting witnesses in the case to converse with them about a material question in the case, and in making experiments to illustrate the suggestion of such witnesses. In a case where the jury were viewing by direction of the court, it was held that "Perhaps, strictly speaking, the jury had no right to do anything more than view the premises, thereby to enable them to apply the evidence given upon the trial." *City of Indianapolis v. Scott*, 72 Ind. 196.

In the present case, while engaged in an unauthorized act, the jurors do that which, strictly speaking, they had no right to do, that is to say, they conversed with others upon a question of importance in the case and made illustrations to prove the truth or falsehood of the appellant's evidence of insanity. Can it be said that because the evidence clearly shows the appellant's guilt that such conduct was not prejudicial to his rights? We think it cannot. The statute which saves a reversal for errors or defects which do not "prejudice the substantial rights of the defendant," has been construed by this court to include "merely abstract and harmless errors." *Epps v. State*, 102 Ind. 539. It is a harmful error, in our judgment, for jurors to so utterly and recklessly violate their duties as to seek and obtain testimony against an accused out of court and in disregard of his constitutional and legal rights. If it were merely a question as to whether

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were on the alert to avoid an injustice to one
liberty may be made to depend upon their cau-
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their oaths as jurors, forgot the admonition of
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come to them except with the consent of the
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the misconduct of the jury, the judgment of
wer court is reversed, with instructions to grant
trial.

March 12, 1896.

No. 17,128.

WICKWIRE ET AL. v. CITY OF ELKHART ET AL.

PUBLIC IMPROVEMENT.—Street.—Void Award of Contract.—The requirement of section 4288, R. S. 1894, that contracts for street improvements, for which the abutting property is ultimately liable, shall be awarded to the best bidder, is violated by the award of a contract containing provisions beneficial to the contractor, not contemplated by the form of bid supplied to bidders, and which are substantially similar to the conditions incorporated in the bid of the bidder to whom the contract is awarded, although such conditions were stricken out before the acceptance of the bid. (See note at end of opinion.)

From the Elkhart Circuit Court.

D. N. Weaver, Osborne & Zook, A. Anderson and L. Hubbard, for appellants.

Chamberlain & Turner, for appellees.

HACKNEY, C. J.—The appellants, who were property owners along the line of Jackson street, in the city of Elkhart, sued the appellees, the city of Elkhart, the members of the common council and the mayor of said city and A. F. Nims, to enjoin the improvement of said street, by said Nims, under a contract awarded by the common council to him for the grading and paving of said street. The circuit court sustained the demurrer of the appellees to the complaint of the appellants, and that ruling is the only assigned error. The improvement undertaken was by virtue of the Barrett law, R. S. 1894, section 4288 *et seq.*, and the proceedings progressed without question to the action of the common council upon the bids for the work. One requirement of the ordinance was that bidders should deposit a certified check for

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\$100 as security for the compliance with their bids in contracting for the work; a form of bid was prepared by the city and supplied to bidders, and the specifications contained the requirement that "All bids shall be made per square yard, setting out in full kinds of brick and other materials to be used, also the price per running foot of curbing; *and no bid shall be entertained having within it any provisions whatsoever.* But the price per square yard shall include all the necessary work and materials in making the pavement complete. *All work specified to be completed by August 1, 1893.*" The appellee, Nims, one Mayer and others, were competing bidders. The two bidders named were lower in their bids than any other bidders, and the bid of Mayer was \$887 less than that of Nims, while the bid of Nims varied from the form provided by the city in containing, in connection with the item of excavating, a charge of one cent per cubic yard for each one hundred feet of hauling beyond one thousand feet; that the work should be completed by December, 1, 1893, instead of August 1, 1893; that he should have the use of the city's street roller without charge, and that the engineer should "make an estimate the first part of each month for all work done the preceding month, and 90 per cent. of same to be paid at once, and the total amount on completion of the contract." The council accepted the bid of Nims, "striking out conditions mentioned in his bid," declared it to be the best bid, and directed the preparation of a contract with Nims. A contract was prepared, reported to and approved by the council, and the mayor was ordered to execute the same on the part of the city. Nims executed the contract and gave bond to the approval of the council, but the mayor declined to execute the contract. The contract so prepared contained the following provisions not

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contemplated by the form of bid so provided and not mentioned in any other proceeding of the council: 1. Limiting the hauling of surplus dirt to one-half mile; 2. That the work should be completed on or about December 1, 1893, and if employes should strike the time for completion should be extended; 3. That estimates should be made each thirty days after the work should begin, and 90 per cent. of such estimates should be paid by the city to Nims, within ten days after making each estimate, "as an advancement upon said work," for which Nims should pay the city at the rate of 6 per centum from the dates of payments to a period not to exceed sixty days after the completion of the work, and the city to advance the balance unpaid upon said work within said sixty days.

The statute, R. S. 1894, section 4288, provides for the giving of the contract to "the best bidder, after advertising for three weeks * * * to receive proposals therefor;" it provides, further, section 4290, that the corporation "shall be liable to the contractor for the contract price of said improvement" and the lot owners shall be liable to the city, upon a basis prescribed, and the property shall be liable to a lien for the amount. The liability of the city to the contractor, it is further provided by section 4292, may be discharged, in part, by estimates as the work progresses and payments from the treasury upon such estimates, deducting a reasonable percentage thereof to secure the completion of the contract.

In Elliott on Roads and Streets, p. 371, the correct doctrine, with relation to the special assessment of property for such improvements, is stated with clearness and precision. It is said: "The right to levy local assessments is regarded as an extraordinary one, and it cannot be deduced from the general words of an act incorporating a municipal corporation, unless the

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words employed assume to grant, and do clearly grant, that right. The words of a statute assuming to grant the authority to levy local assessments will not be extended by construction for or against the corporation; the construction is strict, and nothing in its favor will be intended except such matters as are clearly implied from the express words of the statute. * * * * The power is purely a derivative one, and it is not only fettered by all the limitations contained in the statute which delegates it, but it has no existence beyond the scope which a strict construction will yield." Again, it is said, p. 371, "Where the statute from which the authority is derived prescribes the mode in which it shall be exercised, that mode must be pursued. There is here a diversity of opinion, some of the cases going so far as to hold that a literal compliance with the statute is essential, while others hold that a substantial compliance is all that is required. In view of the extraordinary character of the authority, and of the fact that it is a delegated one, the only safe course is to apply the general and long established rule regarding the exercise of naked statutory powers and require that the mode of exercising it shall be strictly pursued. * * * It is, however, the duty of the courts to resolve doubts against the validity of the exercise of the authority wherever there is any substantial deviation at all, and to sustain proceedings in cases where there is not an exact compliance with the statute only when it clearly and unmistakably appears that no possible injury has resulted to the land-owner, or could result to him." The authorities in support of these propositions are numerous and will be found cited in the notes to the text.

That the common council had power to improve the street in question and to assess the cost of the

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improvement against the property is clearly given by the express provisions of the statute cited. It no less clearly appears from the language, and the necessary implication from these provisions, that the council, in the exercise of this power, should award contracts for the work upon and as the result of fair competitive bidding. No one could say, with the support of reason, that such a contract, awarded without receiving a bid, would be valid. Such a contract would not be awarded pursuant to the mode pointed out by the statute. The purpose and object of the statute is manifest. It was designed to protect the interests of the property owner in securing the best results for the least expenditure and to spare municipal officers the embarrassment, if not the opportunity for corrupt action, of denying contracts to personal and political friends whose proposals are not so favorable to the property owner as that of another. It is as clearly implied from the language and purpose of the statute as if distinctly written in words that the contract must be the result of the competition. In *Platter v. Board, etc.*, 103 Ind. 360, it was said: "The provisions of a statute intended to prevent favoritism and insure fair competition upon equal terms to all who choose to compete in bidding, are enforced with a firm hand." Was the contract in question the legitimate result of the competition offered by the council? If the council could strike from the bid the objectionable features therein, a proposition we do not consider, it is difficult to see how the contract could be made upon a basis entirely different from that contemplated by the specifications and the form of bid supplied. It is, it seems to us, perfectly clear that all competitors were entitled to place their bids upon the basis upon which the contract was to be awarded and that to require bids upon one basis and award the

contract upon another was, in practical effect, but to abandon all bids.

If the hauling of surplus dirt was to be limited to one-half mile and that was a material element in considering the price at which the work could be done, that material fact should have been in the possession of all bidders. If the time within which the improvement should be completed was a material consideration in the contract, it was material in the bidding. The council regarded it as material as evidenced by the stipulation that the work should be completed by August 1, 1893. It is manifest that the time for performing the work was a material element to be considered by the bidders as affecting the price at which the work could be accomplished. The advantage of four months additional time was valuable to contractors who might be enabled to carry two or more pieces of work instead of devoting the best part of the season to a single improvement. That advantage might reasonably have affected favorably to the property-owners the bids of all of the competitors.

While the statute permits the council, probably without so stipulating in the contract, to make estimates and payments from time to time as the work progresses, there is no requirement that such payments shall consist of 90 per centum of the estimates, and if payments, so near the value of the work contemplated, each thirty days are to be made, that fact should have been placed in the possession of all of the bidders, to have enabled them to estimate the value of the use of so much of their capital during the progress of the work. The discretion of allowing, after contract, but 50 per centum of 90, would make a difference in the amount of the prepayments to the contractor of nearly \$10,000 under this contract. The use of this considerable sum is valuable to the con-

tractor, and enables him to carry on the improvement with less capital than if he should not receive so full an advance payment. If one bidder is kept in ignorance of the amount to be advanced he is at a disadvantage with those who may calculate definitely with reference to the capital required. Nims evidently felt the force of this reasoning when he agreed to allow 6 per centum upon such advance payment. This allowance, however, should not be considered as squaring the possible disadvantage to the property owner in not having had this favor extended to other bidders who might have regarded the use of the advancements worth 10 per centum, and thereby to have reduced their bids in that ratio.

It will not be understood that we hold the contract void because the bidders were not advised in advance of the distance of hauling surplus dirt, the time for the completion of the work and the percentage of estimates to be paid in advance. What we do hold is that to require of the bidders, or some of them, that their proposals shall be made without any knowledge of these elements of the contract, thus requiring them to make their calculations from, to them, the most unfavorable standpoint, and to permit others to bid and secure the contract with such knowledge, violates the purpose of the statute. It destroys the essential features of fair competition, and enables one to bid either with facts before him which are withheld from others, or enables the council to award a contract to some favored bidder upon more favorable terms than others had reason to believe could be procured.

In this instance Nims secured the contract upon terms more favorable and entirely different from those upon which all others formed their bids. When his bid was accepted, striking out the features which departed from the elements upon which all bids were

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asked and received, if it did not destroy his bid it was so because he was concurring in the bid made new by the alteration. He thus had the advantage of two bids. But if such features were stricken out to place all bidders upon an exact equality and give no preferences to any, the contract not having been executed upon the bid so reformed was as if made without bids. In brief, the contract in this case was not awarded upon the bid of Nims, nor was it awarded upon the competition held.

It is unnecessary that we should consider the question as to whether Nims, whose bid was higher than that of Mayer, was the "best bidder." Nor do we decide whether the deposit of the certified check by bidders tended to restrict competition.

The circuit court erred in sustaining the demurrer to the complaint, and for that error the judgment is reversed, with instructions to overrule said demurrer.

Filed March 13, 1896.

NOTE.—As to the right of the lowest bidder on public contract, see note to *Anderson v. President and Directors of Public Schools (Mo.)*, 26 L. R. A. 707.

No. 17,299.

MILLER v. BOTTENBERG ET AL.

PLEADING.—Answer.—Written Instrument.—Exhibit.—The original written instrument upon which an answer is based, or a copy thereof, must be filed and made part of the answer as an exhibit, under section 865, R. S. 1894, providing that when any pleading is founded on any written instrument the original or a copy must be filed therewith.

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APPELLATE PROCEDURE.—Answer.—Exhibit.—Demurrer.—The overruling of a demurrer to an answer, because of the failure to file with it the original written agreement upon which it is based, or a copy thereof, as required by section 865, R. S. 1894, is reversible error, where the record does not show that such agreement was properly read in evidence, and was of the force and character ascribed to it in the answer, or otherwise show that the merits of the cause have been fairly determined.

From the Allen Superior Court.

Leonard & Leonard and *R. Lowry*, for appellant.

H. Colerick and *J. E. K. France*, for appellees.

MCCABE, J.—The appellant, Miller, sued the appellee Bottenberg and another, to dissolve a partnership theretofore existing between said parties, and for an accounting.

Upon the issues joined there was a trial, finding and judgment for the defendants.

The only error assigned and not waived by the appellant is upon the action of the superior court in overruling a demurrer to the third paragraph of the answer of the defendant Bottenberg. The answer admitted that such partnership had existed, but alleged that prior to the commencement of this suit "said defendant and said Miller agreed, in writing, upon terms of dissolution satisfactory to both of said parties, and that in consideration of \$450.00, which the said Miller agreed to pay to said Bottenberg for all his * * interest * * in and to all the partnership property, "with certain exceptions, alleging that the assets thus excepted were then and there divided between the partners. And that on such dissolution there had been a full accounting between the partners, and that all the debts of the firm had been paid."

The only objection urged to this paragraph of answer is that it alleges that the agreement of dis-

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solution was in writing and that the original agreement, or a copy thereof, was not filed with and made a part of the answer as an exhibit.

The statute provides that: "When any pleading is founded on any written instrument, or on account, the original, or a copy thereof, must be filed with the pleading." Burns R. S. 1894, section 365 (R. S. 1881, section 362). This requirement has been held to be imperative. *Brown v. State, ex rel.*, 44 Ind. 222; *Prince v. State, ex rel.*, 42 Ind. 315; *Wolf v. Schofield*, 38 Ind. 175; *Peoria, etc., Ins. Co. v. Walser*, 22 Ind. 73; *Montgomery v. Gorrell*, 51 Ind. 309; *Anderson School Tp. v. Thompson*, 92 Ind. 556; *Overly v. Tipton, Admr.*, 68 Ind. 410; *Old v. Mohler*, 122 Ind. 594; *Blackwell v. Pendergast*, 132 Ind. 550.

It has been held by this court that the statute quoted applies with equal force to an answer founded on a written instrument. *Hillis v. Wilson*, 13 Ind. 146; *Sayres v. Linkhart*, 25 Ind. 145; *McCormick, etc., Co. v. Glidden*, 94 Ind. 447; *Landon v. White*, 101 Ind. 249; *Ashley v. Foreman*, 85 Ind. 55. We find no such writing or a copy thereof filed with the answer.

But it is earnestly contended that the error was harmless and therefore not sufficient ground to warrant a reversal.

It is provided in the code that: "No objection taken by demurrer, and overruled, shall be sufficient to reverse the judgment, if it appear from the whole record that the merits of the cause have been fairly determined." Burns R. S. 1894, section 348 (R. S. 1881, section 345).

This statute was applied by this court so as to avoid a reversal where a demurrer had been, as here, overruled to a pleading founded on a written instrument, the original or a copy thereof not being filed

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with the pleading. *Baker v. Pyatt*, 108 Ind. 61. The ground on which this court refused to reverse for the error in overruling the demurrer in that case, was that it appeared from the whole record that the merits of the cause had been fairly tried and determined. See *Lake Shore, etc., Ry. Co. v. Kurtz*, 10 Ind. App. 60.

In *Baker v. Pyatt*, *supra*, there was a special finding of the facts from which this court could see that no harm had been done to the defendant by the plaintiff's failure to file the original or a copy of the deed on which the second paragraph of the complaint in that case was based, it appearing that such instrument was properly introduced in evidence.

The special finding in that case showed that the identical deed described in the paragraph, containing the same mistaken and incorrect description of the land intended to be conveyed thereby, had been executed and that the wrong description was inserted by mistake, as alleged. It was, therefore, made to appear from the whole record that the merits of the cause had been fairly tried, though the trial court had erred in overruling the demurrer to the second paragraph of the complaint for want of sufficient facts, the only defect therein being the failure to file the original or copy of the deed upon which the paragraph was founded.

If the evidence was in the record, and from it we could see that the written contract on which the third paragraph of the answer was founded, had been properly read in evidence, and that it was a contract of the force and character ascribed to it in the answer, a very different question would be presented. We would then be called on to say, under the statutory provisions quoted, whether it appeared from the whole record that the merits of the cause had been

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fairly determined, notwithstanding the error in ruling on the demurrer.

Another section provides that: "The court must, in every stage of the action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment can be reversed or affected by such error or defect." Burns R. S. 1894, section 401 (R. S. 1881, section 398); section 670, Burns R. S. 1894 (R. S. 1881, section 658), make a similar provision.

We are disposed to give full effect to these statutory provisions in all cases to which they apply. But they do not apply to this case, because the record shows that an error has been committed against the appellant, and there is nothing in the record to show that the merits of the cause have been fairly determined, as provided in the first section quoted, or that the error or defect did not affect the substantial rights of the adverse party, as provided in the second and third sections referred to.

The judgment is reversed and the cause remanded, with instructions to sustain the demurrer to the amended third paragraph of the answer.

Filed October 25, 1895; petition for rehearing overruled March 13, 1896.

No. 17,671.

WOODS v. MCCAY, TREASURER.

SUPERIOR COURT.—*Circuit of Three Counties.—Place of Holding Court.*—A statute creating a superior court for three designated counties, and providing that it shall hold its sessions for each county in the town or city other than the county seat containing 4,000 or

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more inhabitants, taken according to the census for a given year, and that if either county should not have such a town or city, the court should be held at the county seat, is not invalid on the ground that it leaves the place of holding the court undetermined, where two of such counties have each one such city and the third county has none.

SAME.—Jurisdiction.—Statute, Constitutionality.—The creation of a court for three designated counties, having concurrent jurisdiction, in certain cases, with the circuit court of such counties, does not violate the State Const., article 7, section 1, as amended March 14, 1881, vesting the judicial power of the State in a Supreme Court, circuit courts, and "such other courts" as the general assembly may establish.

COURTS.—Place of Holding Court.—Constitutional Law.—A statute creating a court for three designated counties, in two of which the sessions are held in different places from those in which the circuit court is held, is not invalid merely because of the inconvenience of having two courts in a county holding their sessions at different places in the absence of any constitutional prohibition in that respect.

SAME.—Place of Holding Court.—Away from County Seat.—An act requiring a court created thereby for three designated counties, to be held away from the county seat, is not void merely because a law, as previously interpreted, requires the courts to be held at the county seats.

SAME.—Constitutional Law.—County Business.—Local Law.—A statute creating a court for three designated counties is not an act regulating county or township business, within the State Const., article 4, section 22, prohibiting the passage of any special or local act on such matters.

SAME.—Concurrent Jurisdiction.—Local Legislation.—Separate Courts.—Constitutional Law.—A statute creating a court for three designated counties, and giving it concurrent jurisdiction with the circuit court in specified civil offenses and over misdemeanors, and providing for separate jury commissioners and for changes of venue applicable to such court alone, is not a law providing for the punishment of crimes and misdemeanors, or for changing the venue in civil cases, within the State Const., article 4, section 22, prohibiting the passage of any local act on such subjects.

From the Lake Circuit Court.

W. C. McMahan, for appellant.

W. Johnston and *W. B. Reading*, for appellee.

MCCABE, J.—The appellant, a tax-payer, sued the

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appellee, as treasurer of Lake county, to enjoin him from paying certain bills incurred by the order of the superior court of Lake county. The circuit court sustained a demurrer to the complaint for want of sufficient facts, and judgment for appellee was rendered upon the demurrer.

This ruling is assigned here as the only error complained of. The reason urged in support of the alleged error assigned is that the act of the legislature creating said court is unconstitutional and void. Acts 1895, p. 210.

The most of the arguments, however, adduced against this act are such only as should have been addressed to the legislature before it passed. The court is to consist of a single judge, and is created for the three counties of Lake, Porter and La Porte, and is given original concurrent jurisdiction with the circuit court in each county in all civil actions, except where the title to real estate shall be involved and in the probate of wills, settlement of decedents' estates and guardianships, which are left in the circuit court; and also it is given concurrent jurisdiction with the circuit court in misdemeanors.

Much is said in appellant's brief about the inconvenience in having two courts in each of the counties of Lake and La Porte holding their sessions in different places, the circuit court at the county seat and the superior court in Lake at Hammond and in La Porte at Michigan City. If the legislature failed to heed this argument, while the bill for the act was pending before it, the only remedy is to elect a better legislature next time. But it may be that the argument furnished by the inconvenience to the inhabitants of a city of 10,000 being compelled to travel fifteen or twenty miles to attend to every matter of business in court, both great and small, was deemed

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by the legislature sufficient to outweigh the other matter of inconvenience mentioned. Be that as it may, we cannot revise their judgment unless the act is in conflict with some provision of the constitution.

It is urged that as the law required the courts to be held at the county seat, this act requiring the superior court in Lake and La Porte counties to be held away from the county seat is void, and counsel cite in support thereof *Board, etc., v. Gwin*, 136 Ind. 562 (22 L. R. A. 402).

That case holds that though there was no statute in existence expressly requiring the circuit courts to be held at the county seats, yet that long continued usage in holding such courts at the county seats exclusively was a practical construction of existing statutes on the subject and was equal to positive law that such courts should and could only be lawfully convened at the county seat of the respective counties. There was no intimation in that case that any constitutional provision had been so construed, but on the contrary, it was expressly held that the constitution made no such requirement and it was not therein held that any constitutional provision had been so practically construed or was capable of such construction.

The law thus held in that case requiring circuit courts to be held at the county seats, was nothing more than a construction of a series of legislative acts. Such laws are subject to repeal or modification by a subsequent legislature.

It is next urged that the act is unconstitutional because it is special and local in violation of section 22, of Article 4, of the State constitution: Because, as is claimed, it is a law which provides for the punishment of crimes and misdemeanors, for changing the venue in civil cases, and for regulating county and township business.

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The section of the constitution referred to does prohibit local or special laws upon these subjects.

That the act in question is not an act providing for the punishment of crimes and misdemeanors, because concurrent jurisdiction with the circuit court over misdemeanors is conferred, is established by many decisions of this court. *Coombs v. State*, 26 Ind. 98; *Anderson v. State*, 28 Ind. 22; *Clem v. State*, 33 Ind. 418; *Guetig v. State*, 66 Ind. 94 (109); *Eitel v. State*, 33 Ind. 201; *Weis v. State*, 33 Ind. 204; *Ex parte Wiley*, 39 Ind. 546; *Cropsey v. Henderson, Aud.*, 63 Ind. 268, and perhaps other cases.

The provisions in the act as to practice simply make the rules of practice applicable that apply to all other courts except in those incidental matters peculiar to that court alone; that is, it provides for separate jury commissioners for that court and for changes of venue applicable alone to that court.

But such incidental matters were held not to infringe the provisions of the constitution as to regulating practice in courts of justice in the cases last referred to, and that was also held in *Vickery v. Chase*, 50 Ind. 461.

That it is not an act regulating county or township business is established by the recent case of *Mode v. Beasley*, 143 Ind. 306, and authorities there cited.

Another constitutional objection urged by appellant is that the act leaves it undetermined and uncertain as to the particular place where the court is to be held. That, however, is not shown to be a violation of any provision of the constitution. But if it were, the objection is not well founded. The provision is that : "The superior court shall hold its sessions for each respective county in the town or city other than

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the county seat for each respective county containing four thousand or more inhabitants according to the return of the census taken under and by authority of the United States in the year 1890." There is a proviso if either county should not have such a town or city the court is to be held at the county seat of such county.

This court and other courts take judicial cognizance that Lake and La Porte counties are the only ones in the district that have a city or town outside of the county seat with such a population, and that those cities are Hammond, in Lake county, and Michigan City, in La Porte county. The act locates the place for holding the court in Lake county at the city of Hammond as much as if it had been named in the act, and at Michigan City, in La Porte county, as if it had been named in the act as the place for holding the court. *Mode v. Beasley, supra; Praigg v. Western Paving, etc., Co.*, 143 Ind. 358.

In Iowa, under a constitutional provision exactly like ours, a law was upheld providing for holding the circuit court outside of the county seat a part of the time. *Cooper, Admr., v. Mills Co.*, 69 Ia. 350, 356. The same is true in Missouri and Michigan, 1 R. S. Mo. 1889, section 3386, p. 833; *Whallon v. Circuit Judge for Ingham County*, 51 Mich. 503.

Much has been said in argument that the legislature could not create another court, which, it is claimed, is in effect another circuit court in the same territory which is occupied by one circuit court already.

This court felt some embarrassment in *Clem v. State, supra*, on that question because the act in question there created another circuit court called a crim-

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inal circuit court to occupy the same territory occupied already by a circuit court. But this court got over the difficulty by holding that the name given was not important if the criminal circuit court was inferior to the circuit court already in existence, and held that it was so inferior. This seemed to be required by the constitution as it then was. It then provided that: "The judicial power of the State shall be vested in a Supreme Court, in circuit courts, and in such inferior courts as the general assembly may establish." R. S. 1876, p. 36, section 1, article 7, Constitution.

But all embarrassment was taken away by the amendment to that section of March 14, 1881, R. S. 1894, section 161 (R. S. 1881, section 161.) The amendment was such as to make the last clause read: "and in such other courts as the general assembly may establish." Such courts need not now be made inferior to the circuit court, and the amendment was doubtless made to meet the growing wants of the State.

But we do not mean to say that the court created by the act was not inferior to the circuit court, but only mean to say that if it were not inferior there would still be no constitutional objection to the act on that account. Though the act is strictly local and special, yet as it is not on a subject embraced in any of the subjects enumerated in section 22 of article 4 of the constitution, and as section 23 of that article left it to the exclusive determination of the legislature whether a general law on any other subject could be made applicable—the determination of that question by the legislature in enacting the law is final and conclusive upon the courts. *Coombs v. State, supra*; *Anderson v. State, supra*; *Clem v. State, supra*; *Guetig v. State, supra*; *Eitel v. State, supra*; *Weis v. State,*

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supra; *Ex parte Wiley, supra*; *Cropsey v. Henderson, supra*; *Gentile v. State*, 29 Ind. 409; *Wiley v. Corp. of Bluffton*, 111 Ind. 152; *Vickery v. Chase, supra*; *State, ex rel., v. Tucker*, 46 Ind. 355; *Kelly, Treas., v. State, ex rel.*, 92 Ind. 236; *Johnson v. Board, etc.*, 107 Ind. 15; *City of Evansville v. State, ex rel.*, 118 Ind. 426 (4 L. R. A. 93); *State, ex rel., v. Kolsem*, 130 Ind. 434; *Bell v. Maish, Treas.*, 137 Ind. 226; *Mode v. Beasley, supra*; *Young v. Board, etc.*, 137 Ind. 323, and authorities there cited.

It follows from what we have said that the act in question is not unconstitutional, and therefore the circuit court did not err in sustaining the demurrer to the complaint.

The judgment is affirmed.

Filed March 24, 1895.

No. 16,922.

MILLER v. THE TERRE HAUTE AND INDIANAPOLIS RY. CO.

RAILROAD.—*Failure to Give Statutory Signals.—Liability.—Contributory Negligence.*—Failure of a railroad company to give the statutory signals on approaching a crossing, does not render it liable for an injury to a traveler who drives upon the crossing without looking or listening for the approach of a train.

From the Marion Superior Court.

Claypool & Claypool, for appellant.

Miller, Winter & Elam, for appellee.

HACKNEY, C. J.—The appellant sustained personal injuries at a crossing of a highway and the appellees'

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road, five miles west of Indianapolis. He had driven west over the crossing an hour or two before and was returning east when one of appellees' freight trains ran upon his conveyance and caused said injuries. The crossing was approached by the appellant over the highway upon a line running directly east while the train approached it upon a line bearing slightly north from an easterly course. He and his companion conversed together without looking or listening for the approach of the train and unmindful of the presence of the crossing until the noise of the train and the crash of the collision came simultaneously upon them. The course of the train varied so slightly from that of the appellant that it came upon him but a little to the right from the rear of his vehicle. For the distance of at least eight hundred feet west of the crossing the railway and the train could have been seen from the highway at any point thereon within several hundred feet of the crossing. The evidence would probably have supported a finding that the appellees were negligent in failing to sound the whistle and ring the bell, as required by the statute. R. S. 1894, section 5307 (R. S. 1881, section 4020), Acts 1879, p. 173. The court having instructed the jury to return their verdict in favor of the appellee, the only question presented by the record and argument of counsel is upon the nonexistence of contributory negligence.

That it is the general rule that no recovery may be had for an injury from negligence where the injured party, by his own negligence has contributed to the injury, is not questioned. Nor is the application of that rule in this case directly questioned, though the insistence of the appellant's learned counsel implies, necessarily, we think, that the rule has no application where the injury results from a failure to give the statutory signals of approach to highway crossings.

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The argument is that since the statute requires the signals, the traveler may pursue his way, relying upon the railway company to comply with the requirement. In support of this argument counsel cite *Pittsburg, etc., Ry. Co. v. Martin*, 82 Ind. 476, where this court said: "The court is bound to take notice of this law. The plaintiff had a right to believe the defendant would obey it," and they cite, also, the case of *Cleveland, etc., Ry. Co. v. Harrington*, 131 Ind. 426, where this court said: "In the absence of some evidence to the contrary, we think the appellee had the right to presume that the appellant would obey the city ordinance and would not run its trains at a greater rate of speed than four miles an hour at the point where the injury occurred, and while the wrongful conduct of the appellant in this regard would not excuse her from the exercise of reasonable care, yet in determining whether she did use such care her conduct is to be judged in the light of such presumption. If when she looked to the north four hundred feet and saw no train, she knew that she could cross the tracks in safety before a train running at the speed fixed by the city ordinance could reach her from that direction, it would be a harsh rule which would adjudge her guilty of negligence because she was struck by a train moving nearly five times as fast as the speed fixed by the ordinances of the city, which she had a right to presume the appellant would obey." In the first of the cases cited the train approached the highway crossing through a cut forty rods long and varying in depth from three to twelve feet, and a view of it from the highway was obstructed until the traveler came near the track. Although the plaintiff in that case looked for the train, he did not see it until his team came within two feet of the track, and when it was

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within ten rods of the crossing and running at the rate of twenty-five miles per hour.

Either case is distinguishable from the present in the fact that some care was exercised by the injured party, and there were attending conditions and circumstances which rendered such care more or less unavailing, while in the present case there was no care on the part of the appellant and the situation was such that slight care would have enabled him to avoid the collision.

In *Cincinnati, etc., R. R. Co. v. Howard*, 124 Ind. 280 (8 L. R. A. 593), it was said of the Martin case that it "is not in harmony with the earlier cases, and is out of line with those more recent," etc. This criticism was in relation to the question of contributory negligence, and was certainly intended to deny the correctness of the contention that a reliance upon the duty of the railway company to give the signals required by law would excuse the traveler upon the highway from the duty to look and listen for trains before going upon the crossing.

There may be some doubt as to the entire justice and propriety of the criticism, since the instruction in question in the Howard case was given upon the theory that the plaintiff was required to prove that she was "without fault or negligence on her part," and it could not, therefore, become a proper inquiry as to the force of a simple reliance upon a proper discharge of the company's duty to give signals. When the Martin case was decided the act requiring particular signals was new, and while the decision was not in exact harmony with the earlier cases, that was because of the then new statute, and not because the traveler upon the highway had been released of all care in going upon a crossing. We do not understand the Martin case or the Harrington case, *supra*, to hold

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that one using a highway at the crossing of a railway may do so without any care for his own safety or the safety of those using the railway, or that he may repose a blind confidence in receiving the warning signals required to be given by locomotive engineers, and pursue his course without looking or listening for the approach of trains. We have no reason to doubt the soundness of the rule in the Harrington case, nor that of the Martin case, so far as it announced the right of the traveler to believe that the railway company would obey the law. But that is not all of the question. The inquiry now before us is this, does the statute, which requires certain signals by the railway company, relieve one crossing the track upon a highway from all care?

The omission of the duty by the company is negligence, and if injury results proximately from that negligence, there may be a recovery, if the party injured has not, by his own negligence, contributed to his injury. This doctrine has been declared and adhered to many times by this court. See *Oleson v. Lake Shore, etc., R. W. Co.*, 143 Ind. 405; *Cincinnati, etc., R. W. Co., v. Duncan, Admr.*, 143 Ind. 524, and in many cases cited in each. In the same cases we have adhered to the rule that it was contributory negligence for one to go upon a railway crossing without looking or listening for the approach of trains. If the only question as to such contributory negligence were the safety of the person crossing the railway, there is good reason to favor the rule just stated. The railway is entitled to precedence in the use of the crossing, the great weight and momentum of its moving trains render it impracticable to run at a low rate of speed or to stop at highway crossings for the safety of travelers, and the known danger from collision with passing trains suggests the importance

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as well as the necessity for care, not only by the company, but by the traveler. There are other interests, however, which add to the demand for this care. That portion of the traveling public using the railways would meet with increased hazards if those using the highways might do so without care as to the approach of trains. The collision at the crossing often results in the loss of life to those upon the trains, and as frequently do shippers suffer from the delays or losses of property resulting from such collisions. Certainly the enactment of a statute defining the degree of care to be exercised by railway companies alone should not be construed to relieve the travelers upon the highway from the care which, in the absence of the statute, he would owe to himself, to those traveling or shipping upon the railways, and to the railway companies. Nothing in the terms of our statute suggests an intention on the part of the legislature to lessen the duties of those crossing railways.

In note 4, p. 34, 4 Am. and Eng. Ency. of Law, it is said, quoting from *Langan v. St. Louis etc., Ry. Co.*, 72 Mo. 392; s. c. 3 Am. and Eng. R. R. cases, 355, "Contributory negligence is not imputable to a person for failing to look out for danger, when, under the surrounding circumstances, the person sought to be charged with it had no reason to suspect that danger was to be apprehended." It is there further said: "It is also somewhat loosely said that a person is not chargeable with contributory negligence in failing to anticipate the fault or negligence of another," citing authorities, "and that one person has a right to rely upon the presumption that another will act with due care," citing many cases. "But these cases do not have the meaning that is imputed to them by the rule as stated. They hold either, 1st, the doctrine of the text, that it is not contributory negligence not to look

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out for danger when there is no reason to apprehend any, or, 2d, that a mere failure to anticipate the negligence or wrong-doing of another is not contributory negligence when it does not amount to a want of ordinary care, or is only a remote cause or the mere condition of the injury; and so the rule is understood by Mr. Beach, Beach Con. Neg., section 13." In some lines of employment and under certain circumstances the rules quoted would excuse a reliance upon the discharge of another's duty, but it has been firmly settled by the cases cited from this State that one using a highway at the crossing of a railway must so far anticipate danger, from the mere presence of a railway, as to make it a part of his duty to look and listen before he goes upon the crossing. The rule thus settled we believe to be in the interest of the traveler upon the highway, of the passenger and shipper upon the railway, and of the railway company, and so believing, we would not seek to break the force of our many decisions, much less to overturn them as appellant asks.

The judgment of the lower court is affirmed.

Filed March 24. 1896.

No. 17,868.

WAYMIRE ET AL. v. WAYMIRE.

TRUST.—*Husband and Wife.—Personal Property of Wife.—Common Law Rule.*—No resulting trust can arise in favor of a married woman in land purchased with her money by her husband in his own name, prior to the passage of the act of July 24, 1858, changing the common law rule, that the personal property of a wife belongs to her husband.

Waymire *et al.* v. Waymire.

PLEADING. — *Partition of Land.*— *Answer of the Twenty Years' Statute of Limitations.*—A plea setting up the twenty years' statute of limitations, in an action to partition land, is good as a plea of the fifteen years' statute of limitations.

From the Madison Circuit Court.

F. S. Ellison, for appellants.

H. D. Thompson and *Goodykoontz & Ballard*, for appellee.

HOWARD, J.—This was an action for partition of real estate, brought by the appellants against the appellee. The complaint was in three paragraphs, the first being a simple plea for partition, setting out a description of the land and the respective interests of the parties therein. In the second and third paragraphs of the complaint, the appellants set up the source of the claim of title under which they alleged ownership of the undivided two-thirds of the land.

On the overruling of a demurrer to the complaint, the appellee filed his answer in two paragraphs, the first being a general denial, and the second a plea of the twenty years' statute of limitations.

To the paragraph of answer pleading the statute of limitations, a demurrer was overruled; and this ruling is assigned as error. In this paragraph of answer the appellee averred that for more than thirty years prior to the commencement of the suit he had been in the peaceable and undisturbed possession of the land sought to be partitioned; that during all that time he claimed to be the absolute owner of said land in fee simple; and that the appellants all had knowledge of such possession and claim of ownership; that, therefore, appellants' cause of action, if any there were, accrued more than twenty years before the commencement of this suit.

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Appellants contend that the twenty years' statute of limitations here claimed as a bar to the action does not apply; that the suit being for the partition of land, only the fifteen years' statute of limitations could be pleaded.

We do not think that appellants' contention can prevail. It is true, that in *Nutter v. Hawkins*, 93 Ind. 260, where an action for partition was brought, and where answers were filed averring that the cause of action had not accrued within five years, or within fifteen years, or within twenty years, the court held that only the statute of limitations of fifteen years applied, and that it was not error, therefore, to have sustained demurrers to the other answers. There, however, as a matter of fact, the fifteen years' statute applied, while the twenty years' statute did not. It appeared that the cause of action accrued May 19, 1863; while the action for partition was not brought until December 18, 1882, less than twenty years. That case is, therefore, not authority for holding that if the twenty years' statute is well pleaded, it will not be good as to a limitation for fifteen years, or for any less period. While the fifteen years' statute is the proper one to be pleaded in bar of an action for a partition of lands; yet a plea of the twenty years' statute to such an action will also be good. The burden of proof assumed in making the twenty years' plea is greater; but if one chooses to show that he has been for twenty years in quiet possession of land, claiming to be the owner, when proof of fifteen years would have been sufficient, that is for the pleader alone to determine. If the defendant has, in fact, been in possession for twenty years, he may, for some reason deemed by himself sufficient, desire to plead and prove that fact, and we can see no reason why he should not be permitted to do so.

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But this question has been expressly decided against the contention of appellants, in the case of *McCray v. Humes*, 116 Ind. 103; and counsel have shown us no good reason why we should now depart from the holding there made. If one has been in possession of land for twenty years, he has been in possession for fifteen years; the greater period includes the less.

The other matters discussed by counsel call in question the correctness of the court's action in overruling the motion for a new trial. It is very doubtful whether what is called the bill of exceptions containing evidence is in the record, and, consequently, whether any of the questions so attempted to be raised by this assignment of error are properly before the court.

Certainly the question as to the alleged error of the court "in refusing to set the trial before a jury, and to be tried by a jury," is not before us. No ruling or refusal to rule upon the subject appears anywhere in the papers filed in the case.

If the evidence is in the record, it shows, as we think, that at the time of the purchase of the land in question the appellee paid for it himself, in part cash, and in part by his own note; and also that he took the deed for the land in his own name, and has so held it ever since. It is true, that some evidence offered by appellants tended to show that appellee's wife, since deceased, and through whom appellants claim title to the land, gave to her husband, out of the proceeds of property received from her father's estate, the money which he paid for the land; and that the land thus purchased by him was consequently held in trust for her. This was, however, in the year 1849, and hence during the time when, according to the rule of the common law, the personal property of a wife belonged

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solely to her husband. It was not until the act of July 24, 1853, that a different rule was adopted in this State, and that it was declared that such personal property remained her own. Section 2649, R. S. 1894, (section 2488, R. S. 1881). No trust could, therefore, result to appellee's wife in the land thus purchased by him, even if purchased by money thus received from her, which, moreover, we do not think is shown to have been the fact. See *Westerfield v. Kimmer*, 82 Ind. 365.

Some other questions are discussed by counsel; but we do not think there is anything in the record to show why the judgment of the trial court should be reversed.

• Judgment affirmed.

Filed March 24, 1896.

No. 17,416.

SHUMAN v. COLLIS ET AL.

APPELLATE PROCEDURE.—*Dismissal.*—*Parties Appellant.*—*Vacation Appeal.*—A vacation appeal, by one of two joint judgment defendants, will be dismissed, where the other defendant is made an appellee instead of an appellant, under section 647, R. S. 1894, requiring all parties against whom judgment is rendered to be made appellants on such an appeal.

From the Madison Circuit Court.

J. C. Shuman, for appellant.

E. B. McMahan, for appellees.

MONKS, J.—Appellee Collis brought this action against appellant and appellee, James Etchison,

144	333
146	503
147	691
144	333
153	314
144	333
154	394
144	333
159	420
144	333
167	551
168	656

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sheriff of Madison county, to enjoin said sheriff from selling the real estate of appellee, Collis, on an execution issued on a judgment in favor of appellant against said Collis.

A judgment was rendered in the court below, enjoining appellant and Etchison, as such sheriff, from selling said real estate or any part thereof.

It is well settled that all parties against whom judgment is rendered in the court below must, in all vacation appeals, be made appellants in this court, or the appeal will be dismissed for want of jurisdiction. Section 635, R. S. 1881 (section 647, R. S. 1894); *Denke-Walter v. Loeper*, 142 Ind. 657, and cases cited; *Midland R. W. Co. v. St. Clair*, 144 Ind. 363.

There can be but one appeal from the same judgment, when the same is not a term time appeal all parties entitled to appeal must be joined as co-appellants. *Denke-Walter v. Loeper, supra*, and cases cited.

Final judgment was rendered in this case October 9, 1893, and the appeal was perfected October 8, 1894. The appeal, therefore, is not a term time appeal, and is not governed by the provisions of the act approved March 9, 1895. (Acts 1895, p. 179). James Etchison was a joint judgment defendant with appellant in the court below and should have been made an appellant in this court. This has not been done, and the appeal must therefore be dismissed.

The appeal is dismissed.

Filed March 25, 1896.

Lumbert *et al.* v. Woodard *et al.*

No. 17,521.

LUMBERT ET AL. v. WOODARD ET AL.

MORTGAGE.—Priority of Mortgages.—Street Railroad.—A mortgage executed by a railroad company upon its railway property alone, will not attach to an electric plant subsequently purchased by the company, so as to take precedence over a mortgage on such plant to the vendor to secure the purchase-price.

CHATTEL MORTGAGE.—What Constitutes.—Vendor's Lien.—An instrument stating that one of the parties thereto has parted with the ownership of certain property, and that the other party owes a specified balance thereon, and that the former intends to maintain a "vendor's lien" on the property for such debt, will be construed as a chattel mortgage, and when properly recorded constitutes a valid lien.

EVIDENCE.—Parol, of Written Lease.—Parol evidence of the contents of a written lease, sold by plaintiff to defendant, is admissible, where a motion was made by plaintiff to require defendant to produce it, and the affidavit of defendant showed that it was not in its custody.

From the Elkhart Circuit Court.

H. D. Wilson and W. J. Davis, for appellants.

Stephens & Stephens, Chamberlain & Turner and J. M. Van Fleet, for appellees.

HACKNEY, C. J.—On petition by appellant Lumbert, one Charles W. Fish, was appointed receiver for the Elkhart Electric and Railway Company, a corporation formed by the consolidation of the Citizens' Railway Company and the Elkhart Electric Company, and the appellees, Woodard and Proctor, by consent of the court, sued said receiver upon certain notes, held by them severally, and as alleged a written lien securing said notes, for \$8,000.00, executed by said Elkhart Electric Company, and alleged to have been assumed by the new company.

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Upon the motion of the receiver, John Cook, trustee for the holders of bonds to the amount of \$25,000.00, secured by mortgage, and executed by said Citizens' Railway Company, and one Frederick W. Miller, trustee for the holders of \$65,000.00 of bonds, secured by mortgage, executed by said new company, were made parties. Each of said trustees, Cook and Miller, interpleaded and sought the foreclosure of the mortgages held by them respectively, and alleged the seniority of their mortgages severally to any lien of Woodard or Proctor.

Upon issues formed and trial had, with special finding and conclusions of law, decree was rendered declaring the alleged lien of Woodard and Proctor senior to the mortgages held by said trustees. The sufficiency of cross-pleadings by Woodard and Proctor severally, the correctness of the court's conclusions of law and the ruling denying a new trial are all urged, upon assignment of error and argument, for the reversal of the judgment of the circuit court. The principal question between the parties is as to the effect of the instrument asserted by Woodard and Proctor to constitute the senior lien so held by the trial court. That instrument was as follows: "In consideration of the sum of \$17,000.00, to me in hand paid by the Elkhart Electric Company, I have bargained and sold, and by these presents do hereby sell and convey to said Electric company, all of the electric-light plant in Elkhart, Indiana, including buildings, water wheel, shafting, dynamos, lamps, poles, wires, and all other property, rights and franchises in any manner pertaining to or connected with said plant, it being the only electric plant now operated and located in the city of Elkhart, Indiana. This sale and conveyance to include a transfer and full assignment of all my right, title and interest in the water

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power and the lease with the Elkhart Hydraulic Company, with which said plant is now operated. And I hereby certify that said plant is owned solely by myself; that the same is clear and free from all incumbrances whatever. And I hereby guarantee to defend the same against all lawful claims held or claimed by any persons whatever prior to this date, claiming under or through me. In this sale and transfer it is distinctly understood and agreed that I am [to] retain and do hold a vendor's lien on all of said property and plant, and all new additions thereto made by said Elkhart Electric Company, to secure the payment of \$13,000.00 balance of purchase money due on said plant, evidenced by sundry notes of various amounts, aggregating said amount of \$13,000.00, all bearing even date herewith and drawing interest at the rate of 8 per cent. per annum, payable annually, and all attorneys' fees, all payable at the First National Bank of Elkhart, Indiana. One note for \$2,000 due in six months from date, and four notes for \$2,750 each, due respectively on the second day of January, 1890, 1891, 1892 and 1893, all signed by said Elkhart Electric Company and payable to the order of Marion C. Proctor. Witness my hand and seal, this 8th day of January, 1889.

MARION C. PROCTOR. [SEAL.]

"The Elkhart Electric Company hereby accepts the terms and conditions of the foregoing instrument and agrees to all its obligations therein contained to execute and perform. Witness the name of said company, which is hereto subscribed, by order of its board of directors, by O. N. Lumbert, its president, and E. P. Willard, its secretary, January 8, 1889.

ELKHART ELECTRIC COMPANY.

By O. N. LUMBERT, President.

By E. P. WILLARD, Secretary.

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STATE OF INDIANA, }
ELKHART COUNTY. } ss.

“Before me, E. C. Bickel, a notary public of said county, personally came Marion C. Proctor and acknowledged the execution of the annexed instrument.

“Also, came the Elkhart Electric Company, by O. N. Lumbert, its president, and E. P. Willard, its secretary, and acknowledged the execution of the foregoing and annexed instrument.

“Witness my hand and official seal this 8th day of January, 1889.

“E. C. BICKEL, Notary Public. [SEAL.]”

This instrument was recorded in the chattel mortgage record of Elkhart county, two days after its execution, to-wit: January 10, 1889, the county named being that in which the parties resided. The notes held by Woodard were two of those referred to in said instrument, and that held by Proctor was another of the same series. The property so included in said instrument, and certain additions thereto, are particularly described in the cross-pleadings and special finding of the court.

The mortgage to Cook, trustee, was executed, not upon that covered by the foregoing instrument, but upon the street railway property. It was executed in May, 1886, but the property of the railway company was consolidated with that of the electric company in March, 1891. The alleged lien of Woodard and Proctor is, by the conclusions of law, found and the judgment of the circuit court applied only to the property covered by the above copied instrument and subsequent additions thereto.

The supposed injustice of maintaining a lien in favor of Woodard and Proctor, as against Cook, trustee for the bondholders, having a lien upon the rail-

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way property, is suggested upon the assertion that the electric plant was made new and increased from the proceeds of a sale of the railway property. This assertion is not sustained by any finding of the court, or allegation of the pleadings in question. All of the property of the new company, railway and lighting plants combined, was sold by the receiver for \$21,000.00, and the court expressly found that the proportion of said sum derived from the electrical plant alone, and consisting of the items covered by said copied instrument and the additions made thereto, was twelve twenty-firsts (12-21), or \$12,000.00. It was against this sum that said lien was directed, and not against the parts of said sum representing nine twenty-firsts of said purchase money, or the proportionate value of the railway property. If the alleged lien of the appellees, Woodard and Proctor, is valid, it would be an injustice to them to permit the lien of Cook, trustee, which was alone upon the railway property, to attach to the electric plant and take precedence over their lien upon the electric plant.

The validity of their alleged lien is attacked by the appellants. One argument is that a "vendor's lien" upon personal property is unknown to the law and applies alone to real estate; that a "vendor's lien" is never an express lien, but arises by implication. The lien in the present instance is not an implied lien, and its validity must depend alone upon the expressed provisions of the instrument. It is not, therefore, that character of lien which equity implies for the protection of the vendor of real estate. Treating it as an attempt to create a lien upon personal property, counsel for appellant maintain that it is not authorized by the statute, R. S. 1894, section 6638 (R. S. 1881, section 4913), which provides that "No assignment of goods, by way of mortgage, shall be valid against any

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other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged, as provided in case of deeds of conveyance, and recorded in the recorder's office of the county where the mortgagor resides, within ten days after the execution thereof."

Of this proposition, counsel for appellants say: "Unless this instrument * * is a chattel mortgage, then it cannot constitute any lien upon the property, because the property was not delivered to the purchaser, or, in other words, the pretended mortgagor, the seller, or pretended mortgagee, parted with possession altogether. Now, a chattel mortgage, to be good as a mortgage, must claim to be given as security for a certain debt. This don't claim anything of the kind."

If we understand this argument, it is that Proctor, having parted with possession, could not create a lien, could not occupy the position of mortgagee, and that the instrument is not a mortgage, since it fails to recite that it is executed as a security for a certain debt. In construing the instrument we must look to the intention of the parties. That intention, as made clearly manifest, was to give evidence that Proctor had parted with the ownership of the electric plant to the electric company; that the company owed a balance of \$13,000.00, the debt being particularly described, and that Proctor intended to maintain a lien upon the property for said debt. While this intention is expressed by Proctor alone, the instrument contains, on the part of the company, a paragraph expressly accepting and agreeing to the terms imposed by Proctor, thereby giving mutuality of purpose in the intention so expressed. Of course, Proctor's lien does not depend upon his retention of possession. It rather

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depends upon the expressed provisions of the instrument, properly recorded, as the statute requires. Recording is, by our statute, made the substitute for possession, where possession is not held by the creditor who asserts an interest by way of lien or mortgage. Both the possession of the property and the recording of the instrument of assignment are not essential to the validity of the lien.

Our statute prescribes no form of chattel mortgage, and that which may be deemed reasonably to express the intention to the parties to secure a particular debt, indicating the property and conforming to the statutory requirements as to acknowledgment and recording should be deemed a chattel mortgage. It is the general rule, as expressed in many of the States, that if it appears, from the instrument that the parties intended it as a security, it is a mortgage. Cobby Chattel Mortgages, sections 12 and 79; *Cooker v. Brock*, 41 Mich. 660; *Weed v. Mirick*, 62 Mich. 414; *Gage v. Chesebro*, 49 Wis. 480; *Peck v. Merrill*, 20 Vt. 686; *McGregor v. Chase*, 37 Vt. 225; *Low v. Wyman*, 8 N. H. 536; *Lawrence v. Neff*, 41 Cal. 566; *Dunning v. Stearns*, 9 Barb. 630; *Ellington v. Charleston*, 51 Ala. 166; *Reynolds v. Ellis*, 103 N. Y. 116; *Byrd v. Wilcox*, 8 Baxt. 65; *Langdon v. Buel*, 9 Wend. 80; *Harris v. Jones*, 83 N. C. 317; *Plummer v. Shirley*, 16 Ind. 380; *Sidener v. Bible*, 43 Ind. 230; *Davidson v. King*, 47 Ind. 372.

In *Sidener v. Bible*, *supra*, the form of mortgage used was such as was in use for mortgaging real estate. It was said by this court: "Still, we think, we must regard it as a valid mortgage of the chattels in question, so far as its form is concerned. It is sufficient in respect to its form to vest in the mortgagee an interest in the property according to the apparent intent of the parties."

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Where no special form is required it is difficult to observe why the manifest intention of the parties should be defeated because more appropriate words might have been chosen. We have no hesitancy in holding the instrument sufficient to constitute a mortgage. The word "vëndor" cannot defeat this conclusion. In its ordinary significance, it is held by the lexicographers to mean *one who sells*, regardless of the character of the property sold.

The lower court admitted parol evidence of the contents of a certain lease to Proctor, and by him sold to the electric company. The record disclosed a motion by Proctor to require the appellee company to produce the lease, and the affidavits of the company's principal officers showed that it was not in the custody of the company, and the impression that it had been cancelled and destroyed. Proctor testified, at the trial that he had turned it over to the electric company at the time of the sale. As its existence was a question for the court we think this showing, *prima facie*, excused the appellee, Proctor, from producing the original. It may be doubted, however, if the contents were not subject to proof by parol without proof of loss since that instrument and its contents were but collaterally in issue. *Coonrod v. Madden*, 126 Ind. 197.

Finding no error in the record, the judgment of the circuit court is affirmed.

Filed March 25, 1896.

Hawks et al. v. The Mayor et al.

No. 17,795.

HAWKS ET AL. v. THE MAYOR ET AL.

144	343
150	90
144	343
156	586

APPELLATE PROCEDURE.—*Motion to Modify Judgment.—Mandamus.*—A motion to modify a judgment awarding a peremptory writ of mandamus must be made before an appeal is taken, in order to present any question as to the correctness thereof.

From the Elkhart Circuit Court.

F. E. Baker and *C. W. Miller*, for appellants.

W. L. Stonex and *A. S. Zook*, for appellees.

MCCABE, J.—This is an appeal from a judgment rendered against the appellants upon an agreed statement of the facts under section 562, R. S. 1894 (R. S. 1881, section 553). The only error assigned here is that “The court erred in rendering judgment against appellants, C. & E. Hawks, and in issuing a peremptory writ of mandate against them.” The agreed statement is as follows:

“THE MAYOR AND COMMON COUNCIL
OF THE CITY OF GOSHEN

v.

THE BOARD OF COMMISSIONERS OF THE
COUNTY OF ELKHART AND C. AND
E. HAWKS.

Submission of the agreed
case, under section 553,
R. S. 1881.

“The mayor and common council of the city of Goshen, Indiana, the board of commissioners of Elkhart county, and C. & E. Hawks, by agreement submit to the Elkhart Circuit Court for decision the following controversy: In the year 1866, and for many years prior thereto, there was a public highway lead-

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ing into the town of Goshen from the southwest. In that year a hydraulic canal company constructed a canal along the west side of the town, which cut through the said highway. The canal company, at its own expense, constructed a frame bridge across the canal at that point, although only wide enough to allow of one team crossing upon it at a time, was of sufficient size to accommodate the travel on the highway and satisfactory to the public authorities.

"The bridge was maintained solely by the canal company until the company, having become insolvent, went into the hands of a receiver in the year 1893.

"C. & E. Hawks bought the canal property of the receivers, and no repairs have since been made. The bridge is now out of repair and dangerous, and a new bridge is necessary.

"The population of Goshen has greatly increased since 1866, and so has that of the adjoining territory southwest of the city. In the vicinity of the bridge on the east new streets have been laid out, and all of the land, then covered with timber on the east, north and south of it, has been platted into city lots and very generally built upon. The highway first mentioned is now West North street, and it and the bridge are wholly within the city limits. Extending from the north, Third street has been opened and terminates at the east end of the bridge, as shown on the diagram attached hereto and made a part hereof. With the increase in population there has been a corresponding increase in the use of the highway and the travel thereon, making it necessary to have a bridge constructed of sufficient width to allow two teams to cross at the same time. To accommodate the travel of Third street it is also necessary to change the location of the bridge, the width of the same, and also to protect it with a guarded approach from the north.

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east, and also to construct said bridge on a different angle. A bridge could be constructed substantially, like that originally built, for \$150.00, but such a bridge as the public necessities require will cost nearly \$650.00. C. & E. Hawks refuse to build or repair the bridge, and the mayor and common council of the city, having first called upon them to build such a bridge as the public necessities require, upon their refusal to do so, have called upon the board of commissioners of Elkhart county to cause the same to be constructed, under the provisions of the act of March 7, 1885. The board of commissioners also refused to construct the bridge.

“The mayor and common council of the city of Goshen claim that as the bridge which must be constructed will cost more than \$500.00, they have no duty in the premises except to notify the board of commissioners of the county of the necessity, and to call upon them to build it at the expense of the county. They also claim that as the necessity for the construction of any bridge at that point was caused by the act of the grantors of C. & E. Hawks, they, and their successors, are bound to maintain the same and keep it in repair in such a way as to fully provide for the public requirements at all times.

“The board of commissioners claim that as the bridge is a private bridge they are charged with no duty in respect to it. They also claim that they are charged with no duty in respect to said bridge for the reason that if the county or city is required to pay such a part of the cost of a sufficient bridge as exceeds the cost of such a bridge as the canal company and its grantees have heretofore maintained, yet this excess is less than \$500.00, and therefore the duty of constructing and paying for it rests on the city, and not on the county. They also claim that if as between

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the county and the public it is their duty to construct a sufficient bridge and pay for the same, yet they are entitled to recover from C. & E. Hawks the cost thereof, or at least a sum equal to the cost of constructing such a bridge as their grantors were originally bound to erect and maintain, and if they are only entitled to recover from C. & E. Hawks the said sum, viz.: \$150.00, they are entitled to recover the residue of the cost of the city, as such residue is less than \$500.00. C. & E. Hawks claim that they should not be liable for any part of the cost of the construction of the new bridge for the following reasons, to-wit: First. That the new bridge ordered to be constructed by the city of Goshen is entirely different from the old structure, and that such change in the size, location and construction of the new bridge is required to accommodate the new and different rights of the public. Second. That the city of Goshen ordering the new bridge to be constructed entirely different from the old structure for the purpose of accommodating the new and different rights of the public, the public authorities have adopted this bridge, and the city of Goshen or the county of Elkhart is bound to erect and maintain said new bridge by reason of their adoption of the same. The questions which the parties hereto desire to submit are as follows:

“First. Which of the parties hereto is required to construct the bridge?

“Second. Which of the parties is ultimately liable for the cost thereof, or any part of the cost?

“Third. Which of the parties is liable for the repair and maintenance thereof after construction?

“It is agreed that after the court has decided the first question a writ of mandate may issue requiring the party adjudged to be liable, to proceed at once to erect a substantial bridge, sixteen feet wide, to be

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placed on stone abutments, with guarded approach from the northeast, so constructed as to allow teams to enter from Third street with ease. It is further agreed that after the court has decided the second question it shall enter judgment against any party which may be liable for the cost thereof, where such party is not the party charged with the duty of constructing the bridge, the amount to be proven to the satisfaction of the court upon the completion of the bridge.

"STATE OF INDIANA, }
ELKHART COUNTY. } ss :

"The city of Goshen, Indiana, by its attorney, A. S. Zook, the board of commissioners of Elkhart county, by A. Griner, one of the members thereof, and C. & E. Hawks, by F. E. C. Hawks, one of the members of said firm, being severally duly sworn, say that the controversy submitted in the foregoing case is real, and the proceedings are in good faith to determine the rights of the parties.

"A. S. ZOOK, Att'y of said City.

"A. GRINER,

"Chairman Board County Commissioners.

"F. E. C. HAWKS.

"Subscribed and sworn to before me this 29th day of September, 1894.

"CHARLES W. MILLER,

[L. S.]

"Notary Public."

The ruling and judgment of the court, and the appellants' exception thereto, are as follows: "Come the parties and this cause is submitted to the court on the agreed statement of facts filed herein, and the court having seen and examined the agreed statement, and being advised in the premises, finds

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that the owners of the hydraulic canal at the west end of North street, in said city, and that the defendants, C. & E. Hawks, being the owners of said canal at this time, are now liable for the construction of such a bridge, and that neither the plaintiffs herein nor the defendant board of commissioners are liable for the same, nor for any part of the cost thereof. It is, therefore, considered and adjudged that a peremptory writ of mandate issue out of and under the seal of the court to the defendants, C. & E. Hawks, commanding them, forthwith, to construct a substantial bridge across the hydraulic canal to the west end of North street, in the city of Goshen, the said bridge be sixteen feet wide, supported on stone foundations, of which that on the west side of the canal shall be at the place where the west end of the present bridge is located, and that on the east side of the canal shall be ten feet north of the place where the east end of the present bridge is located, the sides of the said bridge and the approach at the northeast corner to be provided with substantial guards."

It is further considered and adjudged by the court that said C. & E. Hawks pay the cost of this proceeding, taxed at \$. To which decision of the court defendants, C. & E. Hawks, at the time excepted.

The facts set forth in an agreed case under the section of the statute above cited are in the nature of a special finding of facts by a court, or a special verdict of a jury. First Ency. of Pleading and Pract. 386 and authorities there cited.

Accordingly it was held in *Pennsylvania R. R. Co. v. Niblack*, 99 Ind., at pp. 149, 151, that "In an agreed case, under section 553, *supra*, no pleadings are required, nor is a motion for a new trial necessary. But to present any question to this court there must have been an exception to the conclusions of law upon the

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agreed facts, and such conclusion must be assigned as error in this court. Neither of these things has been done in the present case." To the same effect are *Day v. Day*, 100 Ind. 460; *Fisher v. Purdue*, 48 Ind. 323. It may be the exception to the action of the trial court was both to the conclusions of law and the judgment, and that such exception challenged the correctness of both. Be that as it may, the assignment of error here calls in question nothing but the judgment. Generally, where there is an objection to the judgment, a motion to modify it must be made in the trial court before any question can be presented to this court concerning the same. *Berkey & Gay Furniture Co. v. Hascall*, 123 Ind. 502 (8 L. R. A. 65); *Walter v. Walter*, 117 Ind. 247; *Sanxay v. Hunger*, 42 Ind. 44. Whether it was that part of the judgment adjudging the appellants liable to build the bridge in question, or that part ordering the issue of a peremptory writ of mandate, commanding them to so build it, that is objected to, is not disclosed by the exception or the assignment of error. If it was the former, an exception to the conclusions of law was the proper remedy, and would have made the objection available to test the right of appellees to recover such a judgment. If the objection was to the part of the judgment awarding a peremptory writ of mandamus, a motion to modify the same must precede an appeal to this court, in order to present any question thereon, where the overruling such motion might be assigned for error.

We, therefore, hold that the assignment of error presents no question as to the merits of the controversy determined by the trial court.

The judgment is, therefore, affirmed.

Filed March 25, 1896.

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No. 17,896.

THE CONSUMERS' GAS TRUST COMPANY v. PERREGO.

NATURAL GAS.—*Damages.—Explosion.—Leak in Main.*—The destruction of a building by the explosion of natural gas which escaped from a leak in a high-pressure main 80 or 90 feet distant across a street, and reached the building by penetrating the soil under its frozen surface, renders the gas company liable, where it had made no effort to prevent the leak, although this had continued for several years, and notice of the fact had been given to line-walkers. (See note at end of opinion.)

SAME.—*Notice.—Leak in Main.*—Ample notice of a leak in a high-pressure main of natural gas is given to the owner of the main by a continuance of the leak for several years, and also direct information given to line-walkers.

From the Marion Superior Court.

R. N. Lamb and *R. Hill*, for appellant.

J. F. Carson and *C. N. Thompson*, for appellee.

HOWARD, J.—This action was by appellee against appellant and others, to recover for injuries received from an explosion of natural gas.

It is alleged in the complaint, that on the day of the accident, February 14, 1893, and for a long time prior thereto, the appellee was lawfully an occupant of the dwelling house at the southeast corner of Illinois and Twenty-sixth streets, in the city of Indianapolis; that during the whole period of such occupancy the appellant was engaged in drilling and mining for natural gas, and conveying the same to said city by means of high and low pressure mains, service pipes and regulators, laid along and in said Illinois street, immediately in front of and adjacent to said dwelling house so occupied by appellee; that said natural gas, so conducted along and through said

144	350
146	808

144	350
159	654

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mains, pipes and regulators, subjected the same to a great strain and pressure, to-wit, often of one hundred and fifty pounds to the square inch; that the said gas is of a highly dangerous, penetrating, elusive and explosive nature, and requires great care, caution and perfectly tight mains, pipes and regulators, in order to secure safety in its management and control; all of which was well known to the appellant; that the appellant so carelessly, negligently and unskillfully constructed and maintained its said mains, pipes and regulators that they leaked and permitted said gas to escape from control in large quantities for many weeks in the immediate vicinity of appellee's said dwelling; that such escaping gas percolated and penetrated through the loose sand and gravel until it reached and accumulated in large quantities within the foundations and under said dwelling house, all without the knowledge or fault of appellee; and that the same became ignited without any fault or negligence of appellee, thereby causing a violent explosion within and under said dwelling, completely demolishing the same, destroying the personal property of appellee and causing her great physical and mental pain and injury.

To this complaint a general denial was filed, and the cause was submitted to a jury for trial. On a verdict for appellee judgment was entered in her favor for \$6,000.00, and this appeal followed. The only error assigned is that the court overruled the motion for a new trial.

The ground was frozen over solid at the time of the explosion, and the leak from which the gas escaped into the earth was in the large main, at a point where the main was covered by a "sleeve." It appears that in the fall and winter of 1887 the Broad Ripple Natural Gas Company laid its high pressure

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main line from the city of Indianapolis, northward along the west side of Illinois street, to the wells from which the gas was obtained. The pipe was an eight-inch screw-joint, wrought-iron pipe. In constructing the line, the company had a force of men laying pipe from the city north, and another force laying pipe from the field to the city; and these two forces met a little south of the house under which the explosion afterwards took place. At the point of intersection the pipes could not be screwed together; but the ends were brought up close and connected by a "sleeve." The sleeve was fitted over the ends so brought together and caulked with lead.

The appellant purchased the Broad Ripple line in July, 1889; and the main question for decision is whether appellant was careless and negligent in the purchase, inspection and maintenance of the line during the three years and a half from said purchase until the accident in February, 1893.

The evidence submitted to the jury on this question is exceedingly voluminous. It appears that there was no connection by pipe between appellant's main and appellee's house. The latter was supplied with gas by the Indianapolis Natural Gas Company, which company had its gas main also in Illinois street and close to appellant's line. The location of the sleeve on appellant's pipe, where the gas leaked, was across the street and about ninety feet distant from appellee's dwelling. The sleeve was smooth on the inside, as was the pipe on the outside. The inner diameter of the sleeve was an inch and a half greater than the outer diameter of the pipe over which it fitted. This open space was filled in with lead. There was evidence that there had been a leak at this point and that the gas escaped through the earth from the first laying of the pipe, six years before the explosion. It

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is the theory of the appellee that during all these years the gas permeated the surrounding earth; that it escaped more readily from the surface during the summer, but that when the ground was frozen over the gas was forced to greater distances under the hardened crust. At the time of the purchase of the line by the appellant, a test of the line was made by turning on full gas pressure, being nearly or quite three hundred pounds to the square inch. It is argued that there being a leak, even at that time, under the sleeve, the great pressure thus turned on still further opened or displaced the lead between the pipe and the sleeve, and consequently that the escape of gas was greater after that test.

Counsel for appellant, in arguing that there was no negligence in the purchase, care and maintenance of the pipe line, contend: (1) That appellant employed as superintendent of its pipe lines and gas wells a man of large experience in such work; (2) that before the purchase from the Broad Ripple company the line was carefully tested and found in good condition; (3) that appellant did not know, and had no means of knowing without digging up its entire line, of the existence of the sleeve in question; (4) that after the inspection and purchase of the line, the appellant, by its line walkers and other employes, kept up a careful supervision and inspection of its pipe lines, including that on Illinois street, almost every day up to the time of the explosion; (5) that the line was properly laid, and the sleeve and joint were properly and skillfully constructed; and (6) that the "appellant did not know of the existence of the sleeve, or of a leak at that point, until after the explosion. Its employes, Watson, the foreman of field work, laying pipe, making repairs, etc., and the line walkers, Reichert and Harri-

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son, who walked over the line every few days, had never discovered any evidences of a leak at that point, though it was their special business to look for leaks."

The first, second, third and fifth of these contentions have reference chiefly to care exercised in testing and discovering the condition of the line at the time of its purchase from the Broad Ripple company; while the fourth and sixth relate chiefly to care exercised by the appellant in the inspection and repair of the pipe line after its purchase.

On appeal all presumptions are in favor of the judgment; and if there is sufficient competent evidence to sustain it, the verdict will not be overthrown by reason of any conflict in such evidence.

Mr. Shackleton, general superintendent of the appellant company, and who had full charge of the lines and wells, gave as the only test on examination of the condition of the line made at the time of the purchase from the Broad Ripple company, that a full pressure of about three hundred pounds was turned on at the wells; and he said that the line "stood the pressure all right, apparently," and that he did not know of any leaks thereby disclosed. He also knew, he said, that the main pipe was eight inches in diameter. And he said that he did not learn of the existence of the leak until a few days after the accident. At the time of the purchase he did not, as he testified, make any inquiry as to the location of "sleeves" on the line. They received from the Broad Ripple company a surveyed chart of the line; but he did not examine it particularly. The chart does not seem to have been produced on the trial, although in possession of the appellant company. Mr. Shackleton had never looked on the chart for sleeves, but said he knew from what he saw that they were not indicated on the chart. He did not make inquiry of anyone for sleeves, and did

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not find out whether there were any on the line or not. In the city they do ordinarily keep memoranda of all sleeves, so that if there is a break or a leak they can examine the memoranda and determine where it is located. They had never examined the place where the leak was at the sleeve in question. No repairs had ever been made by the company at that point, from the time of the purchase until after the explosion.

Mr. Watson, general foreman of the company and assistant of the superintendent, in charge of all repairs, testified that after the explosion he had the earth dug up at the sleeve and found a leak on the under side of the sleeve, between the sleeve and the pipe, where the lead seemed to have been "drawn out." He had the leak caulked by hammering the lead all back in tight with caulking tools. It has not since leaked. He found the earth all around blackened with the gas, and thought it would take some time to discolor the earth in that way.

Mr. Lyman, the secretary, testified that there is but little gas turned on the main line in summer, and that there is no regular inspection during that time.

Mr. Everett, who lives in the neighborhood, and who was a witness for the appellant, had smelled gas on the street for a long time, but he thought it came from a "regulator" below Twenty-sixth street, or from one above that street.

Mr. Reichert, a line walker of the company, whose business, among other things, was to examine the line for leaks and to caulk them when found, testified that soon after he went on the line, a few months before the explosion, he smelled gas a few feet north of Twenty-sixth street, but he thought it came from a regulator about 200 feet further north.

Mr. Harrison, another line walker, was at one time

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told by a Mr. Watson, riding by in a buggy that he smelled gas near Twenty-sixth street; but Mr. Harrison testified that he could not discover any leak, and did not report the matter to the office. At other times he smelled gas himself, but thought it came from a regulator. This was about two years before the explosion.

Mr. Page, a witness for the appellant, and who lived on Illinois street, near Twenty-fifth street, had frequently smelled gas near the locality of the sleeve; but, until the explosion, had no knowledge as to where it came from.

Appellant's evidence shows only irregular inspection of the line, except in cold weather, at which time, it is admitted, it would be difficult to detect leaks in the main line, for the reason that the gas could not penetrate to the surface through the frozen ground.

Appellee produced a multitude of witnesses, amongst them one of the contractors and other persons who had aided in digging and covering up the trench when the Broad Ripple line was first laid; also plumbers, gas-fitters and others who had occasion to pass along the sidewalk where the sleeve was placed; also very many neighbors and other persons residing on the street, in the immediate vicinity. These witnesses, without an exception, testified that there had been a gas leak at the sleeve almost from the time the main was first put down, six years prior to the explosion. It was matter of common talk in the neighborhood. The odor was sometimes so strong that passers-by crossed the street to avoid it. One witness, in going along the sidewalk in the evening with a lantern, turned out the light at that point for fear of setting fire to the escaping gas. Several of the witnesses had, at different times, seen the gas on fire as it came up through the earth, as if kerosene oil had been

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poured out and was burning on the ground. After rains, and when water stood in the gutter, the gas was often seen to bubble up through the water.

In at least two instances, appellant's agents, the line walkers, Reichert and Harrison, were notified of the escaping gas at the sleeve and asked to repair the leak. No repairs, however, were ever made at that point until after the explosion.

To say nothing of the notice directly given to appellant's line walkers, it would seem that the continuous leak of gas at this sleeve for the whole period of six years, and particularly during the three years and a half from appellant's purchase to the date of the accident, was ample notice to the company of the existence of this dangerous defect in its high-pressure main.

The appellee testified as to the particulars of the accident; that it occurred in the evening; she had lit the lamp; there was no one else in the house at the time; she had need to go to the cellar to take down a crock of milk; she opened the cellar door, and set the lamp on a bench near by, to show light down the cellar-way; as she went down she thought the light grew dimmer; and as she returned, when half way up the stairs, she looked up at the lamp standing on the bench and saw that the light had grown small and burned blue; immediately after, and before she reached the top of the stairway, she saw the lamp blaze up. She remembered no more until she found herself fastened in the ruins of the house, which had blown up and was already on fire. Her neighbors extricated her from the wreckage. She had not smelled the gas, having been deprived of the sense of smell for many years, and she had no thought of there being any gas in the cellar.

As the house was supplied with gas by the Indian-

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apolis company, it was thought at first that the explosion had been caused by an escape from that company's pipes. Accordingly, the Indianapolis company spent some time uncovering its service pipe from the house across the street, and also its main pipe for some distance, but found no leak.

It was sixteen days after the explosion that the appellant company began to uncover its main to discover whether there was a leak there; and on uncovering the pipe at the sleeve the gas rushed out from the leak with great force.

During the whole period of sixteen days, from the explosion to the uncovering of the sleeve, the escaping gas continued to burn in jets from two to eight inches high, all around the inside of the north, south and west foundation walls of appellee's house. The gas came out between the brick and from the ground along the bottom of the walls. Within two minutes after the uncovering of the sleeve, as the evidence shows, the jets of gas in the foundations of the house ceased to burn; and no gas could be discovered there afterwards.

The earth around the sleeve was found blackened with gas. The ground was frozen above the pipe, and the pipe itself lay in loose gravel and sand. There can be no doubt, as the jury found, that the gas passed from the leak in the sleeve through the loose soil until it reached the foundations of appellee's house, eighty or ninety feet distant, across the street.

Counsel for appellant say that appellee was negligent in not notifying the company of the leak. The leak was across the street from appellee. She did not receive her gas from the appellant. It is hard, therefore, to understand how she should have thought that the leak at appellant's sleeve, ninety feet distant, even if she knew of its existence, which does not ap-

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pear from the evidence, could have been the source of any danger to her.

Other matters are discussed by counsel, including the instructions of the court; but we are unable to discover any substantial error for the reversal of the judgment. The rulings of the court throughout the trial and the instructions were quite as favorable as appellant could ask; and in view of the almost uncontradicted evidence, we are unable to see how the jury could have reached a different conclusion.

As to liabilities of parties in cases of explosions of natural gas, see, generally, *Gas Fuel Co. v. Andrews*, 50 O. St. 695 (29 L. R. A. 337); *Lebanon Light, Heat and Power Co. v. Leap*, 139 Ind. 443 (29 L. R. A. 342); *McGahan v. Indianapolis Nat'l Gas Co.*, 140 Ind. 335 (29 L. R. A. 355); and especially the exhaustive and valuable note to those cases in 29 L. R. A. 337.

Judgment affirmed.

Filed March 26, 1896.

NOTE.—The liability for negligence in the escape and explosion of natural gas is considered at length in a note to *Gas Fuel Co. v. Andrews* (Ohio), 29 L. R. A. 337.

No. 17,751.

HIRE v. THE STATE.

APPELLATE PROCEDURE.—*Waiver.—Sufficiency of Indictment.*—An assignment of error, that the court erred in overruling the motion to quash the indictment, is waived by failing to point out any objection to the indictment.

SAME.—*Weight of Evidence.—Criminal Law.*—A conviction sustained by the evidence, if true, cannot be reversed on appeal, on the ground that the prosecuting witness was unworthy of belief because of his immoral character.

144	359
149	412

144	359
162	800

144	359
165	473

144	359
169	508

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EVIDENCE.—*Admissions of Defendant in Criminal Case.*—Admissions of defendants in a criminal case, which are relevant to the issue, may be given in evidence, whether or not he testifies as a witness.

TRIAL.—*Evidence.*—*Criminal Law.*—*Admitting Original Evidence After Defendant has Closed.*—*Discretion.*—The trial court may, in its discretion, permit original testimony to be given for the State in a criminal case after defendant has closed his evidence.

NEW TRIAL.—*Newly Discovered Evidence.*—*Counter Affidavit.*—A new trial for newly discovered evidence of a witness, who testified on the former trial, is properly refused, where a counter-affidavit of such witness is filed in which she states that her affidavit filed on the motion for a new trial was false, and that the testimony given by her on the trial was true.

SAME.—*Newly Discovered Evidence.*—*Counter Affidavit.*—The trial court may allow the State, on a motion for a new trial for newly discovered evidence in a criminal action, to file a counter-affidavit at any time before the ruling on such motion.

From the Madison Circuit Court.

G. M. Ballard, B. R. Call, E. B. Goodykoontz and C. M. Greenlee, for appellant.

W. A. Ketcham, Attorney-General, D. W. Scanlan, Prosecuting Attorney, D. L. Bishop, W. A. Kittinger and E. D. Reardon, for State.

MONKS, J.—Appellant was tried upon an indictment charging him with murder in the first degree, and found guilty of manslaughter.

The errors assigned are:

1. The court erred in overruling appellant's motion to quash the indictment.

2. The court erred in overruling appellant's motion for a new trial.

3. The court erred in permitting appellee to file the supplemental affidavit of Margaret Bolton over appellant's objection.

No objection to the indictment is pointed out and

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the first error assigned should be considered as waived.

We have, however, examined the indictment, and, although not a model of good pleading, we think the motion to quash was properly overruled.

It is urged that the evidence was not sufficient to justify a conviction of appellant for the reason that the testimony of the prosecuting witness was unworthy of belief on account of his immoral character. It is not claimed that the evidence was not sufficient, if true, to sustain the conviction.

The jury were the judges of the facts of the case and as to the credibility of the witnesses, and we can not, therefore, reverse the case on the weight of the evidence. *Deal v. State*, 140 Ind. 354.

The next cause assigned for a new trial is that the court erred in permitting John Starr, a witness for the State, to testify in rebuttal, that appellant, after he was arrested, said that "on the night Foust was shot he staid all night at Starkey's." It is claimed that this was error for the reason "that appellant had not testified as a witness in his own behalf, and that the same was not proper in rebuttal."

Admissions of a defendant in a criminal case relevant to the issue may properly be given in evidence, whether he testifies or not. But it is claimed that such evidence could only have been given in the opening of the case and not after appellant had closed his evidence. It was within the discretion of the trial court to permit original testimony to be given after appellant had closed his evidence, and appellant had no ground of complaint on that account unless he was refused an opportunity to give evidence in opposition thereto. *Pittsburgh, etc., R. R. Co. v. Noel*, 77 Ind. 110 (122); *Kahlenbeck v. State*, 119 Ind. 118; *Trees v. Eakin*, 9 Ind. 554; *State, ex rel., v. Parker*, 33

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Ind. 285; *Holmes v. Hinkle*, 63 Ind. 518; *Perrill, Admr., v. Nichols*, 89 Ind. 444; *Ransbottom v. State*, 144 Ind. 250. There is nothing in the record showing that appellant was refused such an opportunity.

The next cause for a new trial urged by appellant is for newly discovered evidence.

In support of this cause for a new trial, appellant, in addition to his own affidavit and that of his attorney, filed the affidavit of Margaret Bolton, that she accidentally shot the deceased at her home, and that appellant was an innocent man. Some days after the motion for a new trial was filed, but before the court ruled upon the motion, the prosecuting attorney filed a counter affidavit of said Margaret Bolton, in which it was stated that the affidavit filed with this motion for a new trial was false, and that she did not shoot William Foust, or aid, encourage or assist anyone else to do so; that she did not directly or indirectly kill him or cause his death, and had nothing whatever to do with the killing; that appellant killed the deceased, William Foust, at her house, etc.; and that the evidence she gave on the trial was true; that she was sick and weak and was importuned and frightened into making said first affidavit, the details of which are set forth in the affidavit.

Appellant thereupon filed affidavits of several persons contradicting her statements as to being frightened into making said first affidavit. Said Margaret Bolton and two other witnesses testified at the trial of the cause, that appellant shot and killed the deceased at Margaret Bolton's house.

It appears from the affidavits that the witness would, if a new trial of the cause were granted, testify at the second trial to the same facts as at the first trial. The alleged newly discovered evidence could

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only be used, therefore, to impeach her credit as a witness, provided she testified at the second trial.

The rule is that a new trial will not be granted for the admission of newly discovered evidence to contradict or impeach the testimony of a witness on a previous trial, either by showing that the reputation of such witness was bad for truth, or that his testimony on a former trial was false. *Morel v. State*, 89 Ind. 275 (279), and cases cited; *Sutherlin v. State*, 108 Ind. 389; *Hamm v. Romine*, 98 Ind. 77 (83); *Meurer v. State*, 129 Ind. 587, and cases cited on p. 588.

The case of *Dennis v. State*, 103 Ind. 142, cited by appellant, is not in point. The newly discovered evidence in that case, the court said, was more than impeaching in its character.

The court did not err in overruling the motion for a new trial. It was within the discretion of the trial court to allow the State to file the counter-affidavit of Margaret Bolton, at any time before the ruling upon the motion for a new trial was ruled upon. *Goings v. Chapman*, 18 Ind. 194; *Smith v. State*, 143 Ind. 685.

There is no error in the record.

Judgment affirmed.

Filed March 26, 1896.

No. 17,141.

MIDLAND RAILWAY COMPANY ET AL. v. ST. CLAIR.

APPELLATE PROCEDURE.—*Waiver.*—*Appearance by Appellee.*—*Collateral Proceeding.*—The mere appearance by an appellee to a collateral proceeding, without appearing generally or consenting to a

144	363
142	658
144	834
144	868
153	814
144	363
154	394
144	363
157	493
144	363
158	226
144	363
168	656

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submission, does not waive his right to claim that all the parties have not been brought before the court on appeal, where such question was directly raised on the appearance.

SAME.—Waiver.—Parties.—The appellee cannot waive a failure of the appellant to bring before the court the necessary parties to give it jurisdiction.

SAME.—Necessary Parties to Appeal.—Lien.—An appeal by certain defendants from a judgment declaring that the lien of plaintiff is superior to the liens of the other defendants, referred to in the complaint and finding of facts, which specifically names each defendant, will be dismissed, where the other defendants are not brought before the Appellate Court, although they were defaulted.

From the Tipton Circuit Court.

H. Crawford, W. R. Crawford, B. K. Elliott and W. F. Elliott, for appellants.

L. F. Limbert, G. Shirts and I. A. Kilbourne, for appellee.

HACKNEY, C. J.—The appellee sued the appellants, the Midland Railway Company and the Chicago & Southeastern Railway Company, and numerous others, setting up a purchase of and deed for that part of the Midland railway and road-bed within Hamilton county, in this State, at a sale for delinquent and current taxes; that the defendants, other than said Midland Railway Company, held a mortgage and judgment liens against said property, all of which were, it was alleged, junior to the claim of the appellee for such taxes. As to the Chicago & Southeastern Railway company, it was alleged that it had become a purchaser subsequent to the tax sale, and had thereafter executed a mortgage to a trustee, who was also made a defendant.

The alternative prayer of the complaint was for the quieting of appellee's title to the property, or that he be adjudged to hold a lien upon the property, and

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that such lien be declared senior to the claims of the several defendants. In the Tipton Circuit Court, to which a change of venue had been taken from the Hamilton Circuit Court, all of the defendants, excepting the Midland Railway Company and the Chicago & Southeastern Railway Company, were defaulted, and upon a trial by the court, as between the appellee and said defendants not defaulted, a special finding of facts, and conclusions of law were stated, and the following entry was thereupon made and placed of record by the court: "To each of which conclusions of law as announced by the court, each of said defendants, railway companies, at the time, excepted. And the plaintiff now moves the court for judgment in his favor on said findings and conclusions, which motion is sustained by the court, and the court now renders judgment accordingly. It is therefore considered, adjudged and decreed by the court that the plaintiff, Henry St. Clair, is not entitled to have his title quieted in the said tracts of land and railway road-bed as described in his complaint. It is further considered, adjudged and decreed by the court that there is due the plaintiff from the defendant, the Midland Railway Company, said sum of seven thousand, six hundred and ninety-three dollars and seventeen cents (\$7,693.17) on account of said tax lien sued upon, together with his costs and charges herein laid out and expended, taxed at ——— dollars, and that the same is a lien in favor of the plaintiff against said tracts and parcels of land and railway road bed, described in the complaint and foregoing finding of facts, and that said lien is superior to the liens of the other defendants referred to and mentioned in the complaint and foregoing finding of facts. And it is further considered, adjudged and decreed by the court that the owners of said property shall pay to the

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plaintiff herein the sum of \$7,693.17 and all costs of suit herein laid out and expended, within ninety (90) days from this date, and, in default of the payment thereof within the time aforesaid, that the plaintiff shall be entitled to his legal and equitable rights and process for the collection of the same in any manner authorized by law or equity, or to proceed to collect the same in such manner as may be ordered or directed by any court of general jurisdiction having jurisdiction over such matters." In vacation of the circuit court the Midland Railway Company and the Chicago & Southeastern Railway Company perfected what they here treat as an appeal from the judgment and decree of that court. Said two companies and the appellee, St. Clair, are the only parties to the record in this court, and there is no excuse of record or by assignment of error for not making parties to the appeal herein those persons, not including said companies, who were defendants in the trial court.

One assignment of error is that "The decree as entered is irregular, erroneous and incapable of enforcement." The appellee questions the jurisdiction of this court upon two grounds: (1) that all parties in interest under the proceedings and decree of the trial court are not before this court, and (2) there is no valid final judgment or decree of the circuit court from which an appeal lies. Notwithstanding the above quoted assignment of error, counsel for appellants insist that "The judgment was in every respect final. It finally adjudged a specific sum of money to be due from the railway company to the appellee, St. Clair, on account of a tax lien, and decreed that such amount is a first lien on the railway in Hamilton county. This judgment, until reversed, closes the controversy and is as complete an estoppel as any final judgment could ever be. The only steps that are

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open thereafter to the plaintiff are to take steps 'to collect the same.' The judgment appealed from is not interlocutory or intermediate, but regularly rendered on a final hearing, and because 'the plaintiff moves the court for judgment in his favor on said findings and conclusions.' Every question presented by the issues was disposed of by the judgment and left no further power in the circuit court to grant any further judgment on the pleadings before it."

If not of the character thus claimed for the judgment, there was nothing from which to appeal to this court, and the proceedings in this court should be dismissed. *Gray v. Singer, Admr.*, 137 Ind. 257, and authorities there cited. Whether the decree is of the character claimed for it by the appellants we need not now decide, but, accepting the appellants' view, for the purpose of another question, we proceed to inquire whether the appeal can be entertained without bringing before this court the other persons, who, with the appellants, were co-defendants below. It is the well settled practice that all parties against whom the judgment is rendered are necessary parties appellant. *Gregory v. Smith*, 139 Ind. 48; *Bozeman v. Cale*, 139 Ind. 187; *State v. Hodgins*, 139 Ind. 498; *Benbow v. Garrard*, 139 Ind. 571; *Wood v. Clites*, 140 Ind. 472; *Gourley v. Embree*, 137 Ind. 82; *Colgrove v. Brummitt*, 41 N. E. Rep. 795; section 647, R. S. 1894.

Appellants seek to maintain that because defendants not joined as appellants were not named in the decree and were not jointly interested with the Midland Railway Company in the payment of the tax lien, and were not entitled to any part of the sum recovered, they were not co-parties united in interest. St. Clair presented by his complaint an issue affecting alike all who were made defendants, namely: the priority of a valid lien in his favor. If the lien were

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not valid, the defendants not joined in this appeal would have the opportunity of pursuing, for their claims, property rendered \$7,693.17 more valuable by that conclusion. In the question of the validity of the appellee's lien, every defendant had an interest in harmony with that of the two companies here appealing. This conclusion is made clearer, perhaps, by a concession, for the purpose of illustration, that, as claimed by the appellants, the description of the property sold for taxes is not sufficiently definite in the decree to constitute a valid lien, in the sense in which that question was made in *Swatts v. Bowen*, 141 Ind. 322, and if for that reason the appellants should reverse the decree, it would then be found that defendants, interested alike with appellants, had been precluded by a judgment which did not preclude the appellants. Or, if the complaint should, from the defective description of the property alleged, or other reason, be wholly insufficient, as appellants contend that it is, there is neither reason nor authority for the conclusion that the other defendants could not have appealed, though having suffered a default. In the light of the authorities we have cited there can be no doubt, we think, that such defendants were necessary parties appellant, if they are precluded by the decree, upon the proposition suggested, as the appellants claim to have been precluded. That they were so precluded, though not particularly named in the decree, is no more in doubt than that the appellants were precluded. It is decreed that said lien of St. Clair "is superior to the liens of the other defendants referred to and mentioned in the complaint and the foregoing finding of facts." The special finding of facts to which such reference is thus made, specifically names each of the co-defendants of the appellants and states the amount of his judgment lien

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against the property. It is further true that the decree did not name the appellant, the Chicago & South-eastern Railway Company, and there is no more reason to claim that it is precluded by the decree foreclosing the lien of St. Clair, by the reference to "the other defendants," than that the co-defendants of appellants were not precluded.

It is further insisted that the appellee, before questioning the jurisdiction of this court upon the proposition that all necessary appellants were not in court, has waived his right to question the jurisdiction of this court by his numerous appearances in the filing of certain motions, briefs, etc., on collateral proceedings by way of injunction granted by this court to protect its claim of jurisdiction in this case until a hearing might be had. In this proposition counsel are in error. Before the submission of the cause, and in the first steps taken by the appellee, he questioned the jurisdiction of this court, because of the absence of parties, by motion to dissolve the injunction, and, by brief in support thereof, raised that question. However, it is our opinion that the question is one that the appellee could not waive. In Elliott's App. Proced., section 145, it is said: "It has been held in very many cases that if a case is submitted by agreement the appellee waives the objection that co-parties were not notified. We venture to suggest, notwithstanding the formidable array of cases, that the doctrine that an agreement to submit operates as a waiver is not sound, and we offer as a reason for our conclusion that one party cannot by consent, actual or implied, confer jurisdiction over some other person. A person may, of course, confer authority over himself and his own rights, but he cannot confer authority over another person or his rights," etc. The authorities re-

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ferred to in the text are not in conflict with our conclusion in this case that a mere appearance to a collateral proceeding, not consenting to a submission, not appearing generally, but, when so appearing, directly raising the question, does not waive the right. The reasoning of Judge Elliott is sound and has fuller force on the facts before us than to the proposition to which it was there directed. If the decree is or is not of such strength as to constitute a final determination this appeal should be dismissed, in the first instance because of the defect of parties appellant, and in the second because of the absence of any basis for the appeal. Nor is the question one which may be precluded by the conduct of the parties to the appeal, since it is the practice that the court, discovering the absence of jurisdiction, will, without motion from the parties, dismiss the appeal. *Hutts v. Martin*, 131 Ind. 1.

Pending this appeal, and to protect the jurisdiction of this court against a disposition of the property in question by a receiver appointed after the decree from which this appeal was taken, we granted, on November 14, 1893, a restraining order directed to such receiver, and forbidding interference with such property. Having now ascertained that the appeal is not properly brought into this court, and that the protection of its supposed jurisdiction is no longer essential, said restraining order is dissolved and set aside. And, for reasons above given, the appeal herein is dismissed.

Filed November 25, 1895; petition for rehearing overruled March 26, 1896.

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No. 17,150.

CHICAGO & SOUTHEASTERN RAILWAY COMPANY
v. ST. CLAIR.

144	371
146	208
147	180

ASSIGNMENT OF ERRORS.—*When too General and Uncertain.*—*Receiver.*—An assignment of error on appeal from an order appointing a receiver, that “such order was granted contrary to statute,” is too general and uncertain for consideration.

SAME.—*When too General.*—*Receiver.*—An assignment of error on appeal from an order appointing a receiver, that “such order is irregular and erroneous,” is too general for consideration.

RECEIVER.—*Appointment by Judge While Holding Court in Another County.*—A judge of the circuit court, who is holding a session in one of the counties in his circuit, may make an order appointing a receiver in an action brought in another county, under section 1236, R. S. 1894, providing that receivers may be appointed by the court or the judge thereof “in vacation.”

SAME.—*Appointment After Rendition of Decree.*—A receiver may be appointed after the rendition of a decree, where occurrences arise which threaten the effectiveness of such decree.

From the Tipton Circuit Court.

H. Crawford and W. R. Crawford, for appellant.

L. F. Limbert and Shirts & Kilbourne, for appellee.

HACKNEY, C. J.—On the 2d day of November, 1893, the appellee, Henry St. Clair, filed in the office of the clerk of the Tipton Circuit Court his verified petition, entitled “*Henry St. Clair v. Chicago & Southeastern Railway Co.*,” in which petition it was prayed that a receiver might be appointed to take charge of, to operate, receive the income from and maintain the possession, until otherwise ordered, of the railway and equipment of the Chicago & Southeastern Railway Company. Said petition alleged that “on the 26th day of

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May, 1893," the petitioner "recovered judgment in this action against the said defendant in the sum of \$7,693.17 and the foreclosure of a lien therefor upon the railroad property of the defendant, situate in the county of Hamilton, and State of Indiana, the said sum being amounts due for taxes heretofore levied and assessed against and upon the said railroad property. That in said decree it was further adjudged that said defendant should pay the sum of money within ninety days from the date thereof, and that in default thereof, the plaintiff should be entitled to his legal and equitable right and process for the collection of the same in any manner authorized by law or equity, and to proceed to collect the same in such manner as may be ordered or directed by any court of general jurisdiction having jurisdiction over such matter. And the plaintiff now shows to the court that the said sum of \$7,693.17, together with the costs of said action are still due and remain wholly unpaid, no part thereof having in any manner been paid or satisfied by said railroad companies, or either of them, since the rendition of said decree. And the plaintiff further avers that the defendant, the Chicago & Southeastern Railroad Company, is a corporation owning and, until the times hereinafter mentioned, has been operating a line of railroad known as the Chicago & Southeastern Railroad, extending from the City of Anderson, in Madison county, Indiana, westwardly through said county of Madison and through the counties of Hamilton, Boone, Montgomery, and into the county of Parke, all in the State of Indiana, the said line of railroad so passing through the county of Hamilton, being the identical portion thereof for which lien for taxes was in this cause decreed in favor of the plaintiff." The petition then proceeds to allege the existence of certain mortgage liens, judg-

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ments and claims for unpaid employes' services against said appellant's line of railway; that the appellant was insolvent; that the operation of the railway had been tied up by mechanics, laborers and creditors for several days; that the value of the line and rolling stock was \$5,000.00 per mile, and that the earnings of the road for the six months prior had been appropriated by the officers of the company, leaving claims unpaid. The theory of the petition was that the proceeding for the appointment of a receiver was incident to and a part of an action to establish a lien for taxes paid by St. Clair, though it alleges the prior recovery, in such action, of a judgment for \$7,693.17, and a decree foreclosing a lien therefor against this appellant's railway in Hamilton county, Indiana. The transcript brings into this court the proceedings had in an action by St. Clair against the Midland Railway Company, this appellant and numerous others, wherein he sought by complaint and, on the 26th day of May, 1893, obtained a judgment against the Midland Railway Company for \$7,693.17, together with a declared lien upon the railway of said company, within Hamilton county, Indiana, prior to all claims of this appellant and all others, defendants in said action. Said action, it appears, was instituted in the Hamilton Circuit Court to enforce a lien for taxes accrued in Hamilton county against the Midland railway within Hamilton county. The venue of said action was changed to the Tipton Circuit Court and judgment and decree followed, as we have shown.

The petition for a receiver was heard, and a receiver appointed for the entire railway and equipment, consisting of a line of railway extending through several counties in this State, including Hamilton county, but not including either of the counties of Tipton and Howard. The appointment was made on the

13th day of November, 1893, and in vacation of the Tipton Circuit Court, and by the judge of said court, in chambers, during the term of the Howard Circuit Court, and at the city of Kokomo, in said county of Howard, the said counties of Tipton and Howard then forming one circuit over which said judge presided. The transcript brings also, into this court, a copy of a writ of supersedeas issued by this court on the 11th day of November, 1893, in the appeal of the Midland Railway Company, and the Chicago & Southeastern Railway from the judgment and decree, in said original action, to this court.

The errors assigned in this court, in the present case, are:

1. That the order appointing the receiver is void because the judge had no jurisdiction over the person or property of appellant.

2. That such order is irregular and erroneous.

3. That no suit was pending in said Tipton Circuit Court against appellant when said order was granted.

4. That such order was granted contrary to the statute.

The second and fourth assignments are each too general, indefinite and uncertain to suggest error. The third assignment suggests a mixed question of law and fact, and is not predicated upon any ruling, pleading or evidence in the case. It has been seen that the transcript contains the proceedings had in the original cause, but we have not held that such proceedings are a part of the record. They do not appear in the transcript as evidence, nor as exhibits to or parts of any pleading, and are not made parts of the record by bill of exceptions or order of court. They are recited in the transcript apparently as steps preliminary to the action appointing a receiver. The appellant is responsible for the record as it comes to

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us, and, if we are to indulge presumptions as to its object in bringing these recitals into the transcript, the presumption must be that it was to exhibit the case auxiliary to which the receiver was appointed. These proceedings do not disclose an appeal from the judgment in that case. To establish that fact we are referred to a copy of a supersedeas writ recited by the clerk as a part of his transcript, and which is not shown to have come into the record as evidence, by bill of exceptions or order of court. The record in this case discloses no appeal bond in the original case. These are the facts from which we must judge, if we may consider them, as to whether a case was pending in the lower court at the time of the appointment of the receiver. The question of law involved in this inquiry arises upon the construction and effect of the decree in the original cause, which decree comes to us, as we have shown, by the recital of the proceedings in the original cause. The only knowledge, brought to us by the record, of the hearing of the petition for the receiver, is through the recitals of the order of the judge making the appointment. By said order the proceeding is treated as a part of the original cause; it finds notice to the appellant of the application and discloses the fact that evidence was adduced upon the hearing. It is further disclosed that there were applications, not only by the plaintiff, but by "intervening petitions," and that there was a hearing upon the petition of each. No intervening petitions and no evidence is brought into the record. In considering the third assignment of error, we think it is apparent that the record does not disclose any question of law made available thereby. Assignments of error should present only questions of law. R. S. 1894, section 667.

The first assignment of error: that "the judge had

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no jurisdiction over the person or property of the appellant," remains for consideration alone. It is first insisted that, sitting in chambers in Howard county, the judge of the Tipton Circuit Court, who was, *ex officio*, judge of the Howard Circuit Court then in session, exceeded his territorial jurisdiction in passing upon the application. By R. S. 1894, section 1236, it is expressly provided that receivers "may be appointed by the court, or the judge thereof, in vacation." This is a provision that receivers may be appointed "at chambers," that is to say, "out of court." By Art. 7, section 9, of the State Constitution, and section 1364, R. S. 1894, judges are elected by the voters of their respective circuits, are required to reside within their circuits, and are known as the judges of their circuits. One object in requiring the residence within the circuit over whose courts the judge presides, was to enable those having business within the circuit to find the judge without going to some remote corner of the State to transact such business. Business of the character requiring speedy action, such as the granting of restraining orders, appointing receivers, etc., was contemplated by the requirements as to residence. A proper regard for the business of the court of one county in a circuit would deny any rule which would require the judge, probably in the midst of a trial of great importance, to drop his engagement and hasten to another county of his circuit to pass upon an application for an emergency writ or order. Nor was it contemplated, when our judicial system was framed, that proceedings, often of such emergency as to demand immediate action, should lie over until the judge of the circuit might find it convenient and safe to the business in hand to go to another county specially or in the regular course of his terms of court. Hearings in chambers, we conclude,

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therefore, were designed to be held in any county of the circuit over whose courts the judge may preside. A question similar to this was so decided in *Cincinnati, etc., R. R. Co. v. Sloan*, 31 Ohio St. 1.

It is further contended, against the jurisdiction of the circuit judge, first, that no action to which the petition could become ancillary was pending, the original cause having been finally disposed of and judgment rendered, and, secondly, that an appeal from the original judgment to this court had been perfected, the supersedeas writ having the effect to stay all further proceedings in that case. Disregarding the doubt already suggested as to the condition of the record to disclose the facts involved in these objections and regarding, for the purposes of this question, that what has been called the original action was pending on appeal from a final judgment of the Tipton Circuit Court at the time of the petition for a receiver, we think the question put at rest by the former decisions of this court. In *Connelly v. Dickson*, 76 Ind. 440, the points as to appointments of receivers after final decree was squarely made, and this court, speaking by Woods, J., said: "It is perhaps of rare occurrence that courts are called upon to appoint a receiver after final decree in a cause, but that such appointments may be made is well settled; and this may be done notwithstanding the original bill did not pray a receiver, since the appointment in such case is made because of occurrences subsequent to the decree." See authorities there cited. In *Brinkman v. Ritzinger, Admx.*, 82 Ind. 358, a receiver had been appointed, not only after the final decree, but after an appeal, and this court said: "He may be appointed after the decree, while the decree remains in force, whether such relief was prayed for in the complaint or not," citing authorities. And it was there further said: "That suit,

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having been appealed to the Supreme Court, may be regarded as yet pending for the purpose of an application for a receiver of the rents and profits, and we think the court that rendered the decree appealed from was the proper court to hear and determine such application; whether the application be made by motion or petition, or in the form of a complaint, is, under our practice, immaterial in such a case." The office of a receiver is, manifestly, to aid, by the preservation of property, in making effective the court's decree. It has always been regarded as an auxiliary or ancillary proceeding, and rarely, if ever, as an independent proceeding. If occurrences arise after decree which threaten the effectiveness of the decree, why should not the power exist to then make the appointment? In the present case, when the venue was changed to Tipton county, the parties impliedly, as well as by necessary operation of law, submitted to the jurisdiction of that court all incidental personal and property rights. Of course, we do not suggest that as to person or property the incidental right to the appointment of a receiver without notice was carried into the Tipton Circuit Court. But by force of the change of venue any decree or judgment as to property or person becomes binding as to property as well as to the person, the same as if rendered in the county in which the suit originated. So with reference to any incidental right. The appointment of a receiver, where the petition and proof disclose sufficient facts, is a right incidental to the original suit and is binding alike upon person and property, as the original decree. Here the record discloses notice of the petition. The sufficiency of the petition is not made a question by assignment of error, and we venture no opinion thereon. The questions of insolvency, the character of the railway with reference to its admitting of a receivership

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for that part of the line within Hamilton county alone without interference with public rights, and questions of like character do not involve the jurisdictional objection to the action of the judge of the Tipton Circuit Court, but go rather to the propriety of action than to the power to act.

We conclude, therefore, that no available error is disclosed by the record, and the order of the circuit judge is affirmed.

Filed November 26, 1895; petition for rehearing overruled March 26, 1896.

No. 17,595.

MORRISON ET AL. v. MORRISON.

144	379
145	276
146	392
144	379
151	121

BILL OF EXCEPTIONS.—*When Not a Part of Record.*—*Filing.*—*Certificate.*—Material included in a manuscript, although bearing the form of a bill of exceptions, cannot be considered on appeal, where it was not filed in the clerk's office, and is not certified to be a copy of the original bill.

APPELLATE PROCEDURE.—*Agreed Case.*—*Bill of Exceptions.*—A purported agreement between the parties as to the facts contained in the transcript, standing immediately after the entry of the decree, without a preceding caption, or other indication showing an intention that it should be embodied in a bill of exceptions, followed by a certificate that the foregoing is a full, true, and complete transcript of all papers and entries in the cause as the same appear of record, cannot be considered on appeal, as it is not a bill of exceptions or an agreed case, as authorized by section 562, R. S. 1894.

From the Koscuisko Circuit Court.

J. D. Widaman, for appellants.

W. D. Frazer, for appellee.

HACKNEY, C. J.—The record in this case recites cer-

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tain issues between the parties; that the cause was "submitted to the court for hearing and trial on the complaint, cross-complaint, pleadings and proofs of the parties;" the finding of the court in favor of the appellee, and, over the motion of the appellants for a new trial, decree was rendered in favor of the appellee, quieting the title in him to a certain island in Wawasee Lake. As a part of the decree the appellants were given time to file a bill of exceptions, but it is not shown by any file mark, order book entry, certificate of the clerk, or in any other manner that such bill was ever filed. Following the entry of the decree, as copied into the record, the transcript contains the original, or a copy, of what purports to be an agreement between the parties as to the facts, with certain copies of tax title deeds and receipts. Next following is a certificate by the clerk that "the foregoing is a full, true and complete transcript of all the papers and entries in said cause as the same appear of record," etc. Immediately following the certificate is the assignment of error that "the court below erred in overruling plaintiff's motion for a new trial in said cause." Then follows a certificate, or copy of certificate, as to a bill of exceptions, reciting that "the above and foregoing contains all of the evidence so introduced and filed as aforesaid," with objections, exceptions, etc., and concludes as follows: "And on the 3d day of September, 1894, the defendants tendered their bill of exceptions and prayed that the same might be signed, sealed and made a part of the record in this cause, which is accordingly done, this 3d day of September, 1894. EDGAR HAYMOND, Judge."

This certificate, whether the original or a copy, is manifestly not within the transcript as certified by the clerk. If it ever had any connection with the agreed statement of facts, there is nothing in the

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record so indicating. If the agreed statement of facts was ever embodied in a bill of exceptions, such agreement, or the copy thereof in the transcript, is not preceded by a caption or other indication to that effect or showing that it was so intended.

This is not an agreed case as authorized by section 562, R. S. 1894 (section 553, R. S. 1881); *Witz, Admr., v. Dale*, 129 Ind. 120; *Citizens Ins. Co. v. Harris*, 108 Ind. 392; *Robertson v. Huffman*, 101 Ind. 474; *Pennsylvania Co. v. Niblack*, 99 Ind. 149.

Upon the theory that the agreement as to the facts was to be substituted for the evidence in the case, and to be employed, instead of introducing in the regular way the oral and documentary evidence, a bill of exceptions would be necessary to present any question arising upon the evidence. See cases above cited. If this were not the theory of the proceeding employed, the motion for a new trial and the taking of time for the bill would not have been necessary. We cannot accept the record as purporting to contain a bill of exceptions, but if the material included in the transcript could be deemed to bear the form of a bill of exceptions, its filing in the clerk's office, or at least the certificate of the clerk that it was a copy or the original bill, could not be dispensed with. *Jamison v. State, ex rel.*, 13 Ind. App. 294.

The questions suggested by the motion for a new trial depend upon the evidence, and since the evidence is not in the record no available error is presented. The judgment of the circuit court is, therefore, affirmed.

Filed March 27, 1896.

Rushton et al. v. Harvey et al.

No. 17,747.

RUSHTON ET AL. v. HARVEY ET AL.

DESCENT.—Childless Second Wife.—Husband's Children by Former Marriage.—Real Estate.—Land set off to a childless widow, whose husband left children by a former marriage surviving him, upon her refusal to accept the provisions of his will, in accordance with section 2488, R. S. 1881, giving a widow one-third of her husband's real estate, whether he dies testate or intestate, of which she can only be divested by accepting the provisions of his will, descends, upon her death, to such children freed from any provisions of the will, under section 2487, providing that if a man marry a second wife and has no children by her, but has children alive by a previous wife, the land descending to his wife shall, at her death, descend to his children.

From the Morgan Circuit Court.

J. M. Bishop and W. R. Harrison, for appellants.

J. H. Blair and C. G. Renner, for appellees.

MCCABE, J.—The appellants brought this suit against the appellees to quiet their title in certain land situated in Morgan county, described in the complaint. The issues formed were tried by the court without a jury, resulting in a special finding of facts on which the court stated conclusions of law favorable to the appellees, Otto Rushton and William F. Harvey, upon which they had judgment. The conclusions of law are assigned for error.

The material facts found are that Joshua Rushton, on July 11, 1877, was the owner of 120 acres of land in said county particularly described; that on that day said Rushton duly executed his last will and testament, by which he devised to his wife, Sally Rushton, \$400.00 and one-third of all the rents and

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profits of his real estate during her natural lifetime; and he devised to his grandson, Otto Rushton, \$200.00, and if he shall die while a minor, then said sum to go to any legal heirs; and he further devised all the residue of his estate, both real and personal, to the children of his son Caleb C. Rushton, after his debts and funeral expenses are paid; he directed his personal property to be sold at public sale, the proceeds to pay the above bequests and debts and expenses of administration; said will was probated November 26, 1877; said Joshua Rushton at his death, which occurred prior to November 26, 1877, left surviving him Sally Rushton, his widow, and his son and only living child and defendant, Caleb C. Rushton, and his grandson and only child of a deceased son of said Joshua Rushton, Otto Rushton, defendant herein; that at the time of the execution of said will, and at the time the same was proven and recorded, as above found, said Caleb C. Rushton had three children, Charles B., Grovner, and Otis Rushton, who are the plaintiffs in this action, and are the persons and children meant and intended in this provision in said will, to-wit: "I further will and devise all the residue of my estate, both real and personal, to the children of my son, Caleb C. Rushton, after my debts and funeral expenses are paid;" that the executor named in the will, after qualifying, in settling the estate, sold one of the 40-acre tracts of land devised and one-half of another, and after final settlement of the estate, was discharged on the — day of ———, 1880; that on April 10, 1878, said Sallie Rushton, as widow of said Joshua, elected not to take under or accept the provision made for her in said will, but to avail herself of the provision made for her by the statutes of the State, and for that purpose demanded \$500.00 in money, which the executor paid to her, and she filed

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her petition in partition against the legatees and heirs of said Joshua, deceased; that such proceedings were had thereon in the Morgan Circuit Court, where the same was filed, that judgment was rendered, that one-third in value of said land was assigned and set off to her by commissioners, under the order of said court, which is described by metes and bounds, amounting to 19 42-100 acres, which was duly confirmed by said court on June —, 1878; that said Sallie was the second wife of said testator, and had no child by virtue of said marriage with said Joshua; that defendant Caleb C. Rushton, was a son and child of a former wife of said testator, Joshua, and survived him, and said Otto Rushton was and is the son of Jesse Rushton, deceased, who was a son and child of said Joshua by his said former marriage, and survived said Joshua; that said defendant, William F. Harvey, recovered a judgment against said defendant, Caleb C. Rushton, in the Marion Circuit Court, in this State, on April 6, 1893, for \$382.77 and costs, and filed a transcript thereof in the office of the clerk of Morgan Circuit Court on April 12, 1893, and the same was duly entered of record and docketed; that on August 10, 1894, execution was issued on said judgment against Caleb C. Rushton to the sheriff of said Morgan county, who levied the same on said land so set off to said Sallie, and on September 15, 1894, he duly sold the same on said execution to said Harvey for \$415.67 and issued to him in due form a certificate of such sale; that after said land had been so set off to said Sallie, namely, on September 5, 1884, she sold and conveyed by quit claim deed her interest therein to said Caleb C. Rushton; that on March 10, 1894, said widow, Sallie, died intestate, plaintiffs and defendants surviving her. The conclusions of law stated are substantially as follows: 1. That the land set off to

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said widow descended to her in fee simple from her said husband and as the surviving widow of Joshua Rushton, deceased. 2. That at the death of Sallie Rushton said land so set off to her descended to and vested equally in said Caleb C. Rushton, the only surviving child of Joshua Rushton, deceased, and in Otto Rushton, the only surviving child of a deceased son of Joshua Rushton, deceased, each taking one-half thereof in fee simple. 3. That the interest and share of said Caleb C. Rushton in said land so set off to said widow passed to and vested in him subject to the lien of the judgment held by said Harvey against said Caleb, and that said judgment is a valid and subsisting lien against the interest of said Caleb in said land. 4. That said defendant, William F. Harvey, takes nothing by virtue of the sheriff's sale, set out in the above special finding.

It is contended by the appellant that the land set off to the widow, though she be a childless second wife, did not descend from her to the children of her deceased husband by a former marriage, as provided by the statute, but passed by virtue of the will to the legatees named in the residuary clause of the will. The appellees contend that it descended under the statute from the widow to the children of her husband, by the former marriage, surviving him and the descendants of such as were dead.

Under section 2640, R. S. 1894 (R. S. 1881, section 2483), a widow inherits one-third of the real estate of her deceased husband in the absence of creditors, whether he dies testate or intestate, and she can only be divested of her interest by accepting the provisions of a will, or, as the statute now is, by her failure to make her election whether she will take under the law within one year after the probate of the will. *Collins v. Collins*, 126 Ind. 559; R. S. 1894, section 2666 (R. S.

1881, section 2505). The testator having died prior to November 26, 1877, section 2487, R. S. 1881, was in force, controlled and governed the status of the title to that land. That section provided "That if a man marry a second or other subsequent wife, and has by her no children, but has children alive by a previous wife, the land, which at his death descends to such wife, shall at her death descend to his children."

The words "children alive" in the above proviso have been construed by this court to mean children or their descendants alive. *Scott v. Silvers*, 64 Ind. 76. The above quoted section was amended in 1889, Acts of 1889, p. 430, R. S. 1894, section 2644, so as to vest in such second or other subsequent childless wife a life estate only, instead of a fee simple interest. But that amendment having been made long after the death of Joshua Rushton, the descent was cast and the title vested by virtue of the section before its amendment. The amendment was not intended to have a retrospective effect. The two sections of the statute above referred to having vested the title in fee simple in Sallie Rushton, she having elected to take under the law, relieved it from any control or influence from the will of her husband. When she elected to take under the law the descent was cast and the title vested irrevocably in her in fee simple, and there is only one way by which that title could be divested, and that is by her death. By her death the title did not pass back under the control of the will, but the proviso quoted made the title descend to the children of her deceased husband by a former marriage and to the children of such of them as are dead. *Scott v. Silvers, supra*. That is what the trial court correctly stated the law to be. But how the court came to the fourth conclusion of law we are wholly unable to conjecture. It was to the effect that Harvey's sheriff

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sale of Caleb C. Rushton's interest was invalid, yet there is no fact stated in the finding or reason suggested in argument that has the slightest tendency to invalidate the sheriff's sale. The finding shows that Sallie Rushton died March 10, 1894, and that the sheriff's sale took place September 15, 1894, on an execution that issued on August 10, 1894.

The execution being issued and the sale being made after the death of Sallie Rushton the title to the undivided one-half of the land so set off to her had descended to Caleb C. Rushton, the judgment and execution defendant before the issue of the execution, there is no apparent reason why the sheriff's sale was not good.

But that conclusion was favorable to the appellants and they are not complaining, as they could not complain of it. And the appellees have not complained of it by a cross-assignment of error.

The circuit court did not err in its conclusions of law against the appellants.

The judgment is, therefore, affirmed.

Jordan, J., took no part in the decision of this case.

Filed March 27, 1896.

No. 16,118.

OSGOOD v. SMOCK ET AL.

NEW TRIAL.—*New Matter.*—*Complaint.*—*Diligence.*—*Payment.*—

Reasonable diligence to discover the new matter relating to the payment of a judgment, upon which an action to review a judgment in a former trial, enforcing the judgment mentioned, is based, is not sufficiently averred by allegations of the complaint that the plaintiffs examined the records of judgments, and inquired into

144	387
142	647
145	0
144	387
153	21
144	387
158	373

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the facts from every source where information was likely to be obtained, in the absence of any allegations as to inquiries of the persons alleged to have made the payments, under section 629, R. S. 1894, providing that the complaint must show that the new matter could not have been discovered, before judgment, by reasonable diligence.

From the Marion Superior Court.

A. C. Harris, L. A. Cox and J. S. Tarkington, for appellant.

Ritter & Ritter, for appellees.

MONKS, J.—This action was brought by the appellees, Isaac and Jacob Smock, against the appellant, to review a judgment for material new matter discovered since the rendition thereof.

The facts were stated in the complaint as follows: "That on the 26th day of November, 1877, in cause No. 20658, the Third National Bank, of New York, recovered a judgment in the superior court of Marion county, Indiana, against William C. Smock, as principal, and Isaac Smock, Jacob Smock and George Bruce, as sureties, for \$10,923.10; that an execution was issued on said judgment and levied upon certain real estate of said George Bruce; that after said levy was made said judgment was assigned to the appellant, as appears of record and by his order, the said real estate was not advertised or sold; that said judgment was purchased by said appellant as trustee for himself and five others; that said persons furnished the money to buy said judgment, as well as divers other judgments prior and subsequent in date thereto; that the title to all of said judgments, and the certificates of sale of real estate sold thereon, were vested in the appellant as trustee for said syndicate; that, by an agreement between said syndicate and George, James

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A. and John W. Bruce, the Bruces conveyed to appellant, as trustee, by deed, certain real estate in full satisfaction of said judgment; that said judgment was fully paid and discharged on the 2d day of August, 1884; that on said day said syndicate, in consideration of the payment in full of all of said judgments, sold and conveyed all the real estate held by it to the appellant; that said conveyance included the real estate upon which the execution aforesaid was levied, as well as other real estate in Marion county; that said judgment showed an assignment to the appellant individually, and did not show satisfaction or any payment except the sum of \$1,900.00; that on the 7th day of January, 1888, the appellant filed in the said superior court his complaint to revive said judgment in cause No. 20658, against all of said judgment defendants, except Bruce, alleging that he was the owner and assignee of said judgment, that the same was unpaid, except as to the credit entered thereon, that the Smocks appeared and filed a general denial, and on January 14 said cause No. 37628 was tried and judgment in renewal rendered for \$7,698.09; that said original judgment was never owned by the appellant individually, and was never assigned to him by said syndicate, who were the real owners thereof, and was fully paid and satisfied by the conveyance of said real estate; that the appellees, Isaac and Jacob Smock, examined the records of judgments and proceedings of the courts in Marion county, and also inquired into the facts from every source where information could be or was likely to be obtained, in regard to said original judgment, the payment thereof, credits thereon or any payment of any kind by or on account of said George Bruce, upon said judgment in any way, or his liability to pay, or property held by him out of which payment could be enforced; that they were told

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by said appellant that all of said Bruce's property, real and personal, had been sold and exhausted on executions issued on judgments, prior in date and lien to said original judgments referred to, and that nothing had been or could be realized on said judgment from said George Bruce or William C. Smock; that they had no knowledge of the facts that the said judgment was purchased by said Osgood for said syndicate, and had no knowledge of the payment of the same, nor that said Osgood purchased the same as trustee until within two weeks prior to the institution of this action; that said appellant fraudulently concealed from them all the facts as to the real ownership of said judgments, the transactions of said syndicate, the said sales of real estate by it, the payment, the settlement of the business of said syndicate, and all the facts connected with all the transactions affecting the original judgment; and intentionally and purposely and fraudulently averred in his said complaint to revive said judgment that he was individually the owner of said judgment and that the same was wholly unpaid, on account of which, and the other facts herein set forth, they were deceived and misled as to the actual facts in the premises; that they did not know and could not by any diligence have ascertained or learned the facts as aforesaid, because they were purposely, intentionally and secretly concealed from them. Wherefore they ask that the said judgment be reviewed and set aside."

A transcript of the judgment sought to be reviewed was filed with the complaint.

The appellant, Osgood, filed a demurrer to the complaint, which was overruled and exception taken.

Appellant filed an answer, trial by the court, finding and judgment for appellees.

Appellant filed a motion for a new trial, which was overruled and exception reserved.

The appellant earnestly contends that the complaint is insufficient in this, that it fails to show reasonable diligence to discover the alleged new matter.

Section 617, R. S. 1881 (section 629, R. S. 1894), requires that when the complaint for review is filed for new matter discovered since the rendition of the judgment, it must show that the new matter could not have been discovered before judgment by reasonable diligence, and that the complaint was filed without delay after the discovery. The rule as to diligence is the same in motions for a new trial on account of newly discovered evidence. R. S. 1881, section 559 (R. S. 1894, section 568).

It is a well settled rule that the complaint for review must state the facts constituting the diligence used. General averments of diligence are not sufficient. *Graham v. Payne*, 122 Ind. 403; *McCauley v. Murdock*, 97 Ind. 229 (235); *Johnson v. Herr*, 88 Ind. 280; *Barnes v. Dewey*, 58 Ind. 418; *DeBolt v. DeBolt*, 86 Ind. 521 (524); *Gregg v. Loudon*, 51 Ind. 585; *Morrison v. Carey*, 129 Ind. 277; *McDonald v. Coryell*, 134 Ind. 493; *Hines v. Driver*, 100 Ind. 315 (322); *Schnurr v. Stults*, 119 Ind. 429.

It is also required that if the diligence consists in making inquiries, the time, and place, and circumstances must be stated, that the court may know that the inquiries were made in the proper quarter. It is not sufficient to state generally that they had been diligent in making inquiries of those whom they supposed likely to know anything of the case: all the facts constituting the diligence must be shown. *DeBolt v. DeBolt*, *supra*; *Morrison v. Carey*, *supra*; *McDonald v. Coryell*, *supra*.

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The complaint must also allege how or from whom the new matter was discovered, in order that the court may determine whether by reasonable diligence the same information could have been obtained through the same means before the rendition of the judgment. *DeBolt v. DeBolt, supra.*

The complaint in this case does not comply with any of these essential requirements. There is no attempt to comply with the rule requiring the complaint to state how and from whom the information of the alleged new matter was obtained.

The only allegation of diligence as to payment is, that they examined the records of judgments and proceedings of the court of Marion county, and also inquired into the facts from every source where information was likely to be or could be obtained in regard to said original judgment, the payment thereof, etc. There is no averment that the appellee ever made any inquiry of their co-defendants in said original judgment, William C. Smock and George Bruce. Reasonable diligence would certainly demand that inquiry be made of them. The averment in the complaint is that the judgment was satisfied by George Bruce, James A. Bruce and John W. Bruce conveying certain real estate to said syndicate. If the judgment was so paid, an inquiry of George Bruce would have disclosed that fact. The complaint avers that the records showed that an execution issued on said judgment had been levied upon certain real estate as the property of George Bruce, and that the same had never been offered for sale thereon, and that said real estate was a part of the real estate conveyed by the Bruces to the syndicate. Not to have made inquiry of William C. Smock and George Bruce, under the circumstances alleged in the complaint was negligence.

McGinnis v. Boyd.

The allegation that the appellant fraudulently concealed the facts adds no strength to the complaint. The facts, if any, constituting such fraudulent concealment must be stated.

It is clear that the court erred in overruling the demurrer to the complaint.

The evidence as given at the trial fails even to support the allegations of diligence contained in the complaint. The appellees each testified that they never made any inquiries or investigation in regard to the judgment, its payment or ownership; that they depended on William C. Smock. The evidence does not show any diligence either on his or their part. He was deputy clerk of Marion county from 1878 to 1886, and an examination of the records of that office would have disclosed many, if not all, the facts of which it is alleged the appellees were ignorant. The motion for a new trial should have been sustained.

Judgment reversed, with instructions to sustain the demurrer to the complaint.

Filed March 18, 1895; petition for rehearing overruled March 27, 1896.

No. 17,440.

McGINNIS v. BOYD.

EVIDENCE.—Burden of Proof.—Survey.—The burden is upon a party attacking a survey by a county surveyor, in this State, to show that it is erroneous.

APPEAL.—Bill of Exceptions.—Longhand Manuscript of Evidence.—The longhand manuscript of the evidence, to be available on appeal as a bill of exceptions, must be filed in the lower court, as required by section 641, R. S. 1894.

144	393
147	464
144	393
148	110
148	180
150	90
144	393
156	566

McGinnis v. Boyd.

APPELLATE PROCEDURE.—Assignment of Error.—An assignment that “the court below erred in entering judgment for appellant” presents no question for review by the Appellate Court.

SAME.—Overruling Motion for New Trial.—Evidence not all in Record.—Error in overruling a motion for a new trial, on the ground that the judgment was contrary to the law and the evidence, cannot be considered upon appeal, although the bill of exceptions recites that it contains all the evidence, where it is apparent that a survey read in evidence was not embodied in the bill, or incorporated therein by a reference, under section 638, R. S. 1894, when the bill was signed.

From the Lake Circuit Court.

T. J. Wood, for appellant.

T. S. Fancher, for appellee.

HACKNEY, J.—The appellant herein appealed to the circuit court from a survey by the surveyor of Lake county. The judgment below was in confirmation of the survey. The only motion or proceeding in the lower court presenting alleged errors in the trial was a motion for a new trial, assigning as causes therefor that the judgment was contrary to the evidence and that it was contrary to law. It is here assigned as error that the lower court overruled the motion for a new trial; and, “Second: The court below erred in entering judgment for appellant.” That the second assignment presents no question for review needs but the suggestion that until the circuit court was given some opportunity to pass upon the question no ruling existed to constitute the basis of such an assignment. As to the first assignment, the only possible questions arising and discussed by counsel depend upon the evidence, and the evidence is not properly in the record. The record discloses no entry of the filing, in the lower court, of the longhand manuscript of the evidence. That it should have been filed was indispensable.

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R. S. 1894, section 640; *Prather v. Prather*, 139 Ind. 570. Another objection to the consideration of the evidence is that the record discloses upon its face that, notwithstanding the statement of the bill of exceptions, that it contains "all the evidence given in the cause," it does not contain all of the evidence. In the body of the original bill of exceptions, which follows the papers in the cause, as a part of the transcript, it is shown that "thereupon the plaintiff read the survey made by George Fisher, as found in book 2, at page 8, in evidence, and the same is as follows, to-wit." So much of the transcript is typewritten, and then follows, written with pen and ink, a statement which, upon its face not only implies that it was written in the bill after it was signed by the judge, by its reference to parts of the transcript preceding the bill, but it discloses the facts that the "survey," read in evidence, was not in the bill of exceptions when it was signed, and that it is now in the bill as a part of the record. The statement is as follows: "Which fully appears on pages 2, 3, 4, 5, 6, 7, 8, 9 and 10 of transcript, and it is agreed that the showing on these pages was the survey appealed from, and that the same is a true and complete copy of the record as appears on page 8, book 2, surveyor's office." The alleged agreement is not signed by counsel and is so manifestly not a part of the proceeding at the trial, but came into the record after the transcript containing the bill was prepared, we are unable to accept it as a reference to a document already a proper part of the record. The bill does not purport to incorporate the survey by reference, under R. S. 1894, section 638, and the alleged agreement, treated separately, is not effective as a waiver of the duty to include all the evidence in the bill, since it is not signed by the parties. The survey was *prima facie* correct and the

burden rested upon the appellant to show it to have been erroneous. *Riggs v. Riley*, 113 Ind. 208. If, in fact, a part of the evidence and considered by the lower court, it is important that it should come to this court by some recognized legal method that we also may consider it as a part of the evidence.

It is shown by another part of the transcript and in what purports to be the original bill of exceptions that "It is agreed that the DeCoursey survey contained in Fisher's survey and on page 6 of this record is a true copy of the original government survey." All that we have said of the former statement, as to the Fisher survey constituting no part of the record as evidence, can be said of this statement. However, we may suggest, after having carefully read the entire record, that treating the DeCoursey survey, made in 1867, as part of the evidence and accepting the above statement as true, we have found conflict in the evidence as to whether the parties owning the lands on either side of the disputed line did not, from the date of that survey and for more than twenty years before the last survey, adjust their fences to the line then established, occupy and cultivate their lands up to the line, claiming to be the owners thereof. The conflict in the evidence as to title by adverse possession was for the lower court and not for this court. We may make the further suggestion, as showing the lack of merit in the appeal, though not intending to decide the question, that, by the agreement last quoted, the government survey and the DeCoursey survey established the same corners and lines. By the evidence of surveyor Fisher and by his survey the lines and corners established by the DeCoursey survey were adopted by him. While he denied that they were correct, he felt bound by them. By the above agreement such lines and corners, though Fisher believed them incorrect,

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were correct as being according to the government survey. There was also conflict in the evidence as to the presence and concurrence of the land-owners in the DeCoursey survey, though it was not proven that the statutory notice of the survey was given. That conflict was exclusively for the trial court.

If, however, the trial court had found the DeCoursey survey void for the want of notice, or had learned from the above agreement and the evidence of Fisher that it followed the government corners and lines, and that Fisher followed it, necessarily getting the government corners or lines, the result was correct, that is to say, if Fisher found and followed what is agreed to be the government corners and lines, he did all that it is the object of any survey to do. While it is apparent that there is conflict between the agreement of the parties and the evidence of Fisher, the agreement would, of course, control the decision.

The judgment of the circuit court is affirmed.

Filed January 7, 1896; petition for rehearing overruled March 27, 1896.

No. 17,727.

DOUTHITT v. THE STATE.

TRIAL.—Excluding Juror.—Criminal Law.—It is not too late to exclude a juror in a criminal case after the jury has been sworn.

APPELLATE PROCEDURE.—Insanity of Juror.—When Not Ground for Reversal.—An order refusing a new trial on the ground of insanity of a juror will not be disturbed on appeal, where the appellant's counsel had notice that some question existed of the juror's mental qualification, although not of the inquisition eight years before, and his confinement in a hospital, and the record does not show the full examination of the juror.

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From the Sullivan Circuit Court.

O. B. Harris and *W. T. Douthett*, for appellant.

W. A. Ketcham, Attorney-General, *C. D. Hunt*, Prosecuting Attorney, *W. L. Slinkard* and *W. H. Brichnell*, for State.

HACKNEY, C. J.—The appellant was tried and convicted upon an indictment charging him with the crime of arson. The one question here presented for decision arises upon the appellant's motion for a new trial as presented by the fifth cause in said motion assigned. It was shown by that assignment that a juror had, some years before the trial, been confined, for a short period, as a patient in the insane hospital and had been discharged as improved. It was further shown that the jury had been sworn to try the cause, and, before proceeding with the trial, the prosecuting attorney advised one of the attorneys representing the appellant in said trial that said juror had at one time been considered a "little off" and that it was desired to notify the appellant of that fact. That the judge presiding at said trial called said attorney so representing the appellant, and "repeated substantially the same conversation to him, remarking at the same time that it was a delicate matter." The record discloses no request on behalf of the appellant to further interrogate the juror; no objection was made to the juror's service, and no suggestion was offered or consent given that the juror should be discharged, but, without further question, the trial proceeded to its conclusion. The motion sets out copies of the records of inquisition, confinement and discharge in support of the charge that the juror was disqualified, and states that of such "facts this defendant and his counsel were wholly ignorant until said trial was over

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and the verdict of the jury in said cause was returned." The motion does not purport to disclose the exact words of the prosecuting attorney nor those of the judge in giving to appellant's counsel the notice of the question as to the juror's qualification. The burden rested upon the appellant to negative any notice to himself and to his counsel of the continued unsoundness of mind of the juror, and by the showing made he has negatived notice only of the facts relating to the inquest, the confinement and discharge from the hospital, so far as his counsel were concerned. That his counsel had notice that some question existed, at the time of the trial, of the juror's mental qualification, not only appears from the failure to negative that fact, but is made apparent from the statements of the judge and prosecutor to his counsel. If these statements were of a doubtful or equivocal character, possibly not amounting to notice or not putting the counsel upon inquiry, it was certainly the appellant's duty to disclose that fact or place the notice in the exact form to enable the court to judge whether it was sufficient. That it was intended to negative only the existence of any notice as to the proceedings, confinement and discharge from the hospital is made clear by the fact that the notice given by the judge and prosecutor of the existing question of qualification, preceded the trial and verdict. Otherwise, the two statements of the motion, namely: that which negatives notice and that which discloses notice could not be true.

The facts indicate very clearly that appellant's counsel were willing to know as little as possible of the juror's qualification in this respect before the trial, and as much as possible following it. That it was preferred to take the chances of an acquittal by the jury as constituted, and, failing in that, to pursue

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the suggestion of the judge and prosecutor to obtain the chance of another trial, was manifest. The only possible escape from these conclusions of fact must rest upon the supposition that after the jury had been sworn it was too late to exclude a juror. This supposition, as a question of law, we think is erroneous. *People v. Damon*, 13 Wend. 351; *Dilworth v. Commonwealth*, 12 Gratt. 689; (s. c.) 65 Am. Dec. 264; *McGuire v. State*, 37 Miss. 369; Abbott Trial Brief, Crim. Cases, page 126, section 226; *Bristow v. State*, 15 Gratt. 446; *Harrington v. State*, 76 Ind. 112; *Henning v. State*, 106 Ind. 386; *May v. State*, 140 Ind. 88.

It would be no less than a farce if, because the jury is sworn and a discovery is made which will create a mistrial, the court should be denied the right to discharge a juror and should be required to proceed to the end of the trial and then set aside the verdict or permit the defendant, if a criminal cause, to escape because of an invalid panel. It would be no less a farce, if the defendant discovers, before any evidence is heard, that a juror sworn to try the cause, is disqualified from sitting, and he should be denied the right to disclose that fact and secure an impartial jury of competent triers. And a conclusion still more absurd is that which would permit a defendant who makes timely discovery of a question affecting his interests to sit by and observe the result of that discovery without objection. Such discoveries not disclosed seasonably are not available, but are deemed to be waived. *May v. State*, *supra*.

The record affirmatively discloses that the jury was duly and legally empaneled and consisted of good and lawful men. There is no evidence in the record of the examination of the juror as to his qualification, and we are unable to judge of the extent to which the

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mental capacity of the juror was tested by the court and counsel. Certainly the higher the degree of intelligence displayed by the juror, on his examination, the further would the defendant be removed from a knowledge that the juror was insane. But that the capacity of the juror may have been tested without the direct inquiry as to whether he was of unsound mind is probable.

It has been held by this court in *Indianapolis, etc., R. W. Co. v. Pitzer*, 109 Ind. 179, and *Johnson v. Holliday*, 79 Ind. 151, that where the record does not contain the entire examination of the juror no question will be entertained touching his competency. However, our decision is only upon the question of waiver by reason of notice to counsel.

No available error is disclosed by the record, and the judgment of the circuit court is affirmed.

Filed January 28, 1896; petition for rehearing overruled March 27, 1896.

No. 17,748.

MILLER v. THE STATE.

144	401
149	575

EVIDENCE.—Warehouse Receipt.—A receipt by a warehouseman for a specified quantity of wheat “at stored per bushel, fire and heating at owner’s risk,” sufficiently shows that the wheat was received by him as a warehouseman for storage, and was not sold to him.

WAREHOUSEMAN.—Receipt.—Statutory Requirement.—Estoppel.—A warehouseman cannot claim, in a prosecution under sections 8726, 8728, R. S. 1894, for disposing of goods for which a receipt has been given, without the consent of the holder thereof, that the paper given by him, and acknowledging on its face the receipt of goods for storage, does not conform to the requirements of the statute.

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SAME.—Receipt.—Sufficiency Of.—A receipt by a warehouseman, in the following form : “Received of J. T. 126 bu. 20 lbs. wheat, test 59 wt. at stored per bushel. Fire and heating at owner’s risk,” is in substantial compliance with section 8721, R. S. 1894, requiring every warehouseman to give a receipt on demand of any person from whom he receives goods, setting forth the “brand, quality, kind, and description thereof,” to be designated by some mark.

SAME.—Mixing and Selling Bailed Goods.—Liability.—Criminal Law.—A warehouseman cannot, under section 8726, R. S. 1894, mix wheat received by him for storage with other wheat in his warehouse and sell the mixture in the course of business, without the written consent of the holder of a receipt therefor given by him, or the surrender of such receipt.

INSTRUCTION TO JURY.—Not Based on Evidence.—An instruction is properly refused, where there is no evidence on which to base it.

CRIMINAL LAW.—Warehouseman. — Statute Construed.—Affidavit and Information.—A prosecution of a warehouseman for selling or removing from his control goods for which he has given a receipt, without the written consent of the holder thereof, in violation of sections 8726–8728, R. S. 1894, providing that one who violates any of its provisions shall be deemed a “cheat and swindler, and subject to indictment,” may be, by affidavit and information, under section 1748, providing that all public offenses, except “treason and murder,” may, in certain cases, be prosecuted in that manner as well as by indictment.

From the Kosciusko Circuit Court.

J. D. Widaman and L. W. Royce, for appellant.

W. A. Ketcham, Attorney-General, and *H. S. Biggs*, for State.

HOWARD, J.—The appellant was prosecuted by affidavit and information, for a violation of the provisions of sections 7 and 9 of the act relating to warehousemen and warehouse receipts, etc., approved March 25, 1879; Acts 1879, p. 231; sections 8726, 8728, R. S. 1894 (sections 6547, 6549, R. S. 1881).

It is charged in the information that on or about the 30th day of October, 1893, the appellant was a storage merchant and warehouseman in Kosciusko

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county, and then and there held himself out to the public as a person keeping and operating a storage room and warehouse for receiving in store and caring for wheat and other grain and personal property, and was then and there receiving in store wheat and other grain and personal property from depositors; that one Jonathan Tinkey, on or about said 30th day of October, 1893, in said county, delivered to appellant, and entrusted to him as bailee, in store for the said Tinkey in appellant's storeroom and warehouse, one hundred and twenty-six bushels and twenty pounds of wheat of the value of \$69.50, the property of the said Tinkey; that the appellant issued and delivered to said Tinkey a storage receipt for said wheat; which receipt the said Tinkey received and still holds; that the appellant, while holding said wheat in store for said Tinkey, and without the written consent of Tinkey, did then and there unlawfully, fraudulently, feloniously, wilfully and purposely, sell, dispose of, ship out and remove beyond the immediate control of him, the appellant, all of said wheat, and did unlawfully, fraudulently, feloniously and purposely convert said wheat to his own use, without the written consent of said Tinkey.

A motion to quash the affidavit and information having been overruled, the appellant entered his plea of not guilty. Whereupon the cause was tried by a jury, who returned a verdict of guilty, assessing as punishment imprisonment in the State's prison for three years, with a fine of \$250; and over a motion for a new trial judgment was entered upon the verdict.

The overruling of the motion to quash and the motion for a new trial are assigned as errors.

Under their first assignment of error, counsel for appellant say: "In contending that the information in this case is not sufficient to sustain a criminal

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prosecution, we are aware that we are running counter to the opinion of this court as expressed in the case of the *State v. Miller*," 140 Ind. 168. "In that case," continue counsel, "an information precisely like the one under debate was held to be sufficient. But we are constrained to believe that this court will not adhere to the opinion there expressed, when it comes to review the grounds upon which it is based."

We have carefully considered the able argument of counsel, asking us to overrule the case of *State v. Miller, supra*, but are satisfied that nothing advanced in that argument or shown in the authorities cited casts any doubt upon the correctness of the conclusion there reached. No good purpose would be served by again entering into a detailed discussion of questions there settled.

An inspection of the act of March 25, 1879, here charged to have been violated, makes it evident that the legislature, in passing it, had in mind the protection of the producing classes from losses such as shown in this case. The act is quite distinct in form and purpose from the public warehouse act of March 9, 1875, as amended March 29, 1879. The fact that the compilers of the revised statutes inserted the act of 1879 immediately after that of 1875, does not, of course, make the one amendatory of or supplementary to the other. The two acts were designed for different, though similar, purposes, and are quite independent of each other.

Neither is it true that because it is provided in section 9 of the act under consideration that one who violates any of its provisions "shall be deemed a cheat and swindler, and subject to indictment," therefore the prosecution cannot be by affidavit and information. One guilty of the crime charged against appellant would certainly be "subject to indictment"

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for the offense committed. But by section 1748, R. S. 1894 (section 1649, R. S. 1881), "all public offenses, except treason and murder," may, in certain cases, be prosecuted by affidavit and information, as well as by indictment.

The section of the statute thus providing for prosecution by affidavit and information in the cases named, was not intended to repeal any law providing for prosecution by indictment, but was intended only, in furtherance of the speedy and better administration of justice, to give another mode of prosecution in such cases. There is, therefore, no conflict between section 9, the penal section of the act now before us, and said section 1748, R. S. 1894 (section 1649, R. S. 1881), providing for prosecution by affidavit and information; and, hence, said section 9 was not repealed by section 300 of the criminal code. (Section 2364, R. S. 1894; section 2216, R. S. 1881.)

Under the assignment of error that the court overruled the motion for a new trial, counsel first contend that the allegations of the information are not sustained by the evidence. The essential allegations of the information are, that appellant was a warehouseman, as described in the act alleged to have been violated; that he received the wheat of the prosecuting witness for storage and gave him the receipt therefor; and that he removed said wheat beyond his immediate control, without the written consent of the holder of said receipt.

We are of opinion that all these allegations are abundantly sustained by the evidence. Indeed, we are unable to see that any of the evidence given is to the contrary.

Counsel contend particularly that the wheat was not given for storage, but was sold to appellant. The receipt given by appellant, and which, by section 2 of

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the statute, section 8721, R. S. 1894 (section 6542, R. S. 1881), is made evidence in the action, shows clearly, we think, that the wheat was received by appellant as warehouseman and for storage in his warehouse, as contemplated in the statute. The receipt reads as follows:

“BURKET GRAIN ELEVATOR.

“BURKET IND., October 30, 1893.

“Received of Jonathan Tinkey (for Burket Grain Elevator) 126 bu. 20 lbs. wheat, test 59 wt. at stored per bushel. Fire and heating at owner's risk.

“G. A. MILLER.”

Counsel contend that this receipt is not in form such as required by the statute. If this were true, it would ill become appellant to try to take advantage of it. The statute required him to give the receipt, and prescribed its form. If then, the paper given by him was in acknowledgment of wheat received by him for storage in his warehouse, as indeed it shows on its face; and if the paper so given as a receipt should fail in any particular to conform to the requirements of the statute, that would be rather an aggravation of appellant's wrong than an excuse for it. He ought to have given his receipt as required by the statute, and should not be heard to complain of his own fault in the matter.

But we think the receipt is in substantial compliance with the requirements of the statute, as provided in section 2, *supra*, which reads as follows:

“Every warehouseman, receiving anything enumerated in the preceding section, shall, on demand of the owner thereof, or the person from whom he received the same, give a receipt therefor, setting forth

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the brand, quality, kind and description thereof, which shall be designated by some mark; which receipt shall be evidence in any action against said warehouseman."

The articles provided for in the act, and which may be received for storage in warehouses, include all grains, provisions, produce, merchandise and commodities whatsoever. The receipt given in the case at bar being for wheat, we think the receipt identifies the wheat as nearly as such a commodity can readily be identified, and as nearly as was intended by the statute.

The receipt certainly does not show that the wheat was purchased by the appellant. It would seem, as the evidence also shows, that the receipt was written on a blank form intended to be used both for wheat bought and for wheat stored. Here, in the blank space where the price per bushel would have been placed if the wheat were sold, is found, not any figures showing price to be paid per bushel, but the word "stored." And even more significant are the words: "Fire and heating at owner's risk." If the wheat were bought and not stored, the appellant himself would be the owner; and there would be no sense in guarding in the receipt against the risk of fire and heating. If, however, the grain were in store, and the holder of the receipt were the owner, then there would be good reason for providing that the destruction by fire or the heating of the grain should be at the owner's risk.

Had it been the desire of the parties that appellant should become the owner of the wheat, or that he should sell it after storage, the statute, in section 7, provided the means by which this might be done, with "the written consent of the person holding and producing such receipt."

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Counsel also contend that from the manner in which appellant did business, and of which the prosecuting witness had knowledge, it must have been understood by them both that appellant might mix the wheat with other wheat in his warehouse, and might sell the mixture in the course of business. Undoubtedly the parties might have agreed that this should be done, but only by the written consent of the holder of the receipt or his surrender of the same. No agreement of that kind is shown; and until he thus abandoned his rights under the statute the holder of the receipt is entitled to claim the wheat for which it calls.

Here again, also, appellant is making a claim without any color of right. It is not pretended that he paid for the wheat which he now claims to have bought. Neither is it pretended that he has wheat in kind on hand which the holder of the receipt might have instead of the wheat for which he holds his receipt. On the contrary, the evidence shows that there was no wheat whatever in the warehouse, or elevator, but that appellant had disposed of it all, and thus embezzled the wheat of the prosecuting witness, the very evil against which the statute was directed. By thus converting to his own use the wheat of the prosecuting witness, the appellant became what the statute calls a "cheat and swindler," and subjected himself to the punishment there provided for, and which was inflicted upon him by the verdict of the jury.

In this connection we may notice the contention of appellant that the court should have given instruction number nine asked for by him. By this instruction it was sought to charge the jury that if the wheat was purchased to be paid for on demand, or if the agreement was that wheat of like kind and quantity might be taken out at any time for the wheat delivered to appellant, then appellant had a right

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to consider the wheat so received by him as his own, and so might sell or dispose of it at his pleasure. The objection to this instruction is that it was, as we have seen, not applicable to the evidence given in the case. That evidence showed that the wheat was not sold to appellant, nor placed in appellant's keeping to be exchanged for other wheat; but that it was stored in appellant's warehouse, at the owner's risk.

Instruction number two, given by the court, and of which appellant complains, was, as we think, a correct statement of the law, rather than said instruction number nine, requested by appellant. In this instruction, number two, the court, in effect informed the jury that if appellant, without Tinkey's written consent, mixed Tinkey's wheat with other wheat and sold the same, he was guilty of a violation of the statute. That is but stating what the statute expressly declares. It could not relieve appellant of wrong doing under the statute, because Tinkey should know of that wrong doing. Tinkey's receipt was the evidence, under the statute, of the wheat stored by him in appellant's warehouse. If appellant converted that wheat to his own use and sold it, or otherwise removed it from under his own control, the statute defined his crime as that of "a cheat and swindler," and fixed his punishment therefor. If he were unwilling to receive the wheat under those conditions, he was under no obligations to do so; and if, having so received the wheat, he was unwilling to keep it under the conditions, he could return it. He could not, however, convert it to his own use without incurring the penalty provided in the statute. Otherwise the enactment of the statute would have been a vain and useless piece of legislation.

The judgment is affirmed.

Filed March 31, 1896.

No. 17,837.

DOLIN ET AL. v. LEONARD.

DESCENT.—Real Estate.—Gift.—When Reverts to Donor.—That one who has taken possession of land under a contract of purchase, paid the purchase-money therefor, and made valuable improvements thereon, has a deed made by the vendor directly to the former's daughter, in consideration of love and affection, does not deprive him of the benefit of section 2628, R. S. 1894, providing that an estate which has come as a gift to an intestate, who dies without children, shall revert to the donor, saving to the widower his rights therein.

SAME.—Statute Construed.—Estate by Gift.—Reversion to Donor.—The provisions of section 2650, R. S. 1894, that where a wife dies intestate without children, but leaving a father or mother, her property shall descend, three-fourths to the widower and one-fourth to the father and mother, or the survivor, provided that the whole shall go to the widower, if the entire amount does not exceed \$1,000, does not apply to land which came to the intestate by gift or in consideration of love and affection, which is governed by section 2628, providing that such land shall revert to the donor on the death of the donee intestate without children, saving to the surviving spouse his rights therein, which is a one-third interest.

Appeal from the Montgomery Circuit Court.

B. Crane and A. B. Anderson, for appellants.

M. E. Clodfelter and Puett & McFadden, for appellee.

MONKS, J.—It appears from the special finding of the court, that in 1868 Joseph R. Huff, father of appellee, purchased of one Buchanan the real estate in controversy and paid him therefor; that before the deed was executed Huff took possession of the real estate and built a dwelling house thereon, and enclosed the same with a fence; afterwards said Huff desiring to

give said real estate to his daughter Adaline, directed and caused Buchanan, on the 9th of November, 1868, to execute a deed conveying the same to said daughter. A consideration of \$125.00 was stated in the deed. Adaline accepted said real estate as a gift from her father, the only consideration therefor as between them being love and affection.

Afterwards, in 1889, said Adaline died intestate, the owner of said real estate. She left no child or children or other descendants, but left her husband, Alexander Pickard, her father, and appellee, her sister, surviving her. The only property owned by said Adaline at the time of her death was said real estate, worth \$300.00, and personal property of the value of \$500.00. About one year after the death of said Adaline, her father, Joseph R. Huff, died intestate, leaving appellee, his daughter, as his only heir. In 1894 Alexander Pickard died intestate, leaving surviving him several children by his first wife, said Adaline being his second wife, by whom he had no children. After said Pickard's death, his children conveyed said real estate to John Pickard, appellant, who claims to own all of said real estate by deed from the heirs of said Alexander Pickard. The court below held that on the death of said Adaline, her husband, Alexander Pickard, inherited one-third of said real estate, and the other two-thirds went to her father under the provisions of section 2473, R. S. 1881 (section 2628, R. S. 1894), which is as follows: "An estate which shall have come to the intestate by gift or by conveyance in consideration of love and affection, shall, if the intestate die without children or their descendants, revert to the donor, if living, at the intestate's death, saving to the widow or widower, however, his or her rights therein: *Provided*, That the husband or wife of such intestate shall hold a lien upon such property

for the value, at the intestate's death, of all improvements by him or her thereon, and for all moneys derived from the separate estate of such husband or wife expended in making such improvements."

Appellant insists that the legal title to the real estate was never in Joseph R. Huff, therefore the same could not revert to him under section 2473 (2628), *supra*. It is true, the real estate was not conveyed to Huff by Buchanan, but he had taken possession of the same under the contract of purchase and paid the purchase-money therefor and made lasting and valuable improvements thereon, and was the equitable owner thereof, and could have enforced specific performance of the contract to convey. The fact that he caused the deed to be made by Buchanan directly to his daughter instead of to himself, and then his conveying the same to her did not deprive him of his rights under said section.

It is sufficient answer to this contention of appellant, however, to say that this court has held that the donor, on the death of the donee, takes the estate under said section as heir and not as reversioner or remainderman. *Wingate v. James*, 121 Ind. 69.

Appellant urges, however, "that as the whole amount of property left by said Adaline did not exceed \$1,000.00, it all went to Alexander Pickard, her widower, under section 2489, R. S. 1881 (section 2650, R. S. 1894); that this court had so construed said section in *Thomas v. Thomas*, 18 Ind. 9; and that therefore the appellee, John Pickard, is the owner of all of said real estate under his deed from the heirs of Alexander Pickard."

Said section 2489 (2650) is as follows: "If a husband or wife die intestate, leaving no child, but leaving a father or mother, or either of them, then his or her property, real and personal, shall descend, three-

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fourths to the widow or widower, and one-fourth to the father and mother jointly, or to the survivor of them: *Provided*, That if the whole amount of property, real and personal, do not exceed \$1,000.00, the whole shall go to such widow or widower."

This court, in *Thomas v. Thomas*, *supra*, said that under section 2489 (2650), *supra*, "if the estate of a husband who dies intestate, without a child or children or their descendants, does not exceed \$1,000.00 in value, lands conveyed to him as a gift will not revert to the donor, but will go to the widow of the donee." If this is a correct construction of this section then in such a case if the whole amount of the property left by such husband had exceeded \$1,000.00 the widow would be entitled to three-fourths thereof under said section, and one-fourth would have reverted to the donor, or if the donor of the real estate was neither the father nor mother of the donee, then upon the death of the donee intestate, without a child or children, or their descendants, leaving no father or mother, but leaving a widow or widower, such widow or widower would take the whole estate without regard to its value under section 2490, R. S. 1881 (section 2657, R. S. 1894), which provides: "If a husband or wife die intestate, leaving no child and no father or mother, the whole of his or her property, real and personal, shall go to the survivor." Such a construction of said sections would in effect nullify section 2473 (2628), *supra*, providing that in certain cases real estate should revert to the donor.

This was not the intent of the legislature in the enactment of said sections.

Thomas v. Thomas, *supra*, cited by appellant, was overruled by the following cases: *Myers v. Myers*, 57 Ind. 307; *Fontaine v. Houston*, 86 Ind. 205; *Amos v. Amos*, 117 Ind. 37.

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In *Myers v. Myers, supra*, one Myers, in consideration of love and affection and as a gift, conveyed to his son one hundred and sixty acres of land in this State. The son died in 1872, intestate and without issue, leaving surviving him his widow. This court held that the widow took one-third of said real estate and the father, as donor, took the two-thirds thereof under the provisions of section 2473 (2628), *supra*, that the right which is expressly saved to the widow by said last-named section is one-third, and not three-fourths or all, as provided by section 2489 (2650), as decided in *Thomas v. Thomas, supra*, and claimed by appellant.

In *Fontaine v. Houston, supra*, this court held that when a husband, in consideration of love and affection, transfers his real estate to his wife by conveying the same to another, who reconveys the same to the first grantor's wife, the whole of such real estate, upon her death intestate, without children or their descendants, leaving her mother and her husband surviving reverts to her husband under section 2473 (2628), *supra*, and no part goes to the mother under section 2489 (2650), *supra*. This court said: "The meaning of the two sections, taken together, is, that, if the wife die intestate, leaving a husband and no child, but a father or mother, or either of them, then the property shall descend, three-fourths to the widower and one-fourth to the father and mother jointly, or the survivor of them; but if the property were conveyed to the intestate by such widower in consideration of love and affection, then the whole of it shall revert to him."

It is clear, we think, that sections 2489 (2650) and 2490 (2657), *supra*, do not apply in cases where the real estate came to the intestate by gift or by conveyance in consideration of love and affection.

Section 2473 (2628), *supra*, providing when the estate shall revert to the donor, embraces a distinct class of

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cases not otherwise provided for, and its provisions expressly except it from the other sections, except those which give to the surviving widow or widower one-third. It was the intent of the legislature by this section to save to the widow or widower only that part of such real estate as the donee could not have deprived such widow or widower of by will under any of the other sections.

It follows that the court did not err in its conclusions of law as to the interest owned in said real estate by appellee. There is no available error in the record.

Judgment affirmed.

Filed April 14, 1896.

No. 17,756.

GOFF ET AL. v. HEDGECOCK ET AL.

MORTGAGE.—To Indemnify Sureties.—When Action May be Maintained.—An action to foreclose a mortgage, given to indemnify the mortgagees as sureties for the mortgagor, containing a stipulation that the mortgagor will pay the debts secured, may be maintained as soon as the obligations are due and unpaid without payment of the same by the mortgagees, and compensation for the total probable loss may be recovered as damages.

SAME.—Sale of Personalty by Certain Mortgagees, by Agreement of Parties.—Waiver.—Foreclosure as to Realty Covered by Same Mortgage.—Under a mortgage of both personal and real property, containing no provision as to the possession or sale of the personal property, an agreement between the parties to the mortgage that the personalty should be sold by certain of the mortgagees, and the proceeds applied on the debt which it secured, does not amount to a waiver of the right to foreclose as to the realty, to supply a deficiency remaining after application of the proceeds of the personalty.

SAME.—Sale of Mortgaged Personalty by Certain Mortgagees.—Compensation for Services.—If certain of the mortgagees, under a

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mortgage conferring no right of possession by the mortgagees, or right of sale by them, and by agreement of the other mortgagees and the mortgagor, take possession of and care for and sell the mortgaged personalty, they are entitled, as against their co-mortgagees, to a reasonable compensation for such services out of the proceeds of sale.

From the Tippecanoe Superior Court.

Holstein & Barrett, for appellants.

Palmer & Palmer and *Kent & Irwin*, for appellees.

MONKS, J.—This action was brought by appellees to foreclose a mortgage given by DeWitt C. Bryant to appellees to indemnify them as his sureties on divers promissory notes, executor's, administrator's and guardian's bonds.

Appellant Goff, who alone appeals, filed an answer in eight paragraphs, to each of which appellees demurred for want of facts, which demurrer was sustained to the fourth paragraph and overruled as to the other paragraphs. Appellee filed a reply in general denial. At the trial of the cause, after the evidence was all in, the appellant Goff was permitted to file a cross-complaint, wherein he set up that among the debts secured by the mortgage to appellees was a note to Phebe Culver, upon which Bryant was principal and Seawright and Beaver were sureties; that Culver had recovered a judgment on said note in the Clinton Circuit Court against Bryant and Seawright for \$1,174.00 and costs, and that at the time he bid in the real estate at the sheriff's sale on the execution issued on the Milroy judgment, there was also in the hands of the sheriff an execution issued on said Culver judgment and that he bid \$6,000.00 at the sheriff's sale made on the Milroy judgment, and out of the money thus paid by him the Culver judgment was

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fully paid and satisfied. Prayer that he be subrogated to the rights of Seawright in said mortgage, etc.

A trial by the court resulted in a finding and judgment in favor of appellees on their complaint, and a finding and judgment in favor of appellant Goff on his cross-complaint.

Appellant filed a motion for a new trial, which was overruled. He next filed a motion to modify the judgment.

The errors assigned by appellant and not waived call in question the action of the court, First, in overruling the demurrer to the complaint; Second, in overruling appellant's motion to modify the judgment; Third, in overruling the motion for a new trial.

Appellant insists that "the complaint is insufficient because it does not show that appellees jointly, as sureties, have been compelled to pay a dollar for the mortgagor." The complaint alleges payments, some joint and others by individual sureties. The complaint also alleges the insolvency of the mortgagor, Bryant, and that the mortgage, after describing the bonds and notes secured, contains the following clause: "and the mortgagor expressly agrees to pay the sums of money above secured, without any relief from valuation and appraisement laws."

It is settled law in this State that where a mortgage given to secure the mortgagees from loss by reason of their having become surety for the mortgagor contains a stipulation "that the mortgagors will pay the sums of money above secured," if such obligations are not paid when due, the mortgagees, without having first paid the same, can maintain an action for the foreclosure of such mortgage and recover as damages a compensation for the total probable loss. *Gunel v. Cue, Admr.*, 72 Ind. 34, and cases cited; *Bodkin v. Merit*,

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86 Ind. 560, and cases cited; *Durham v. Craig*, 79 Ind. 117, and cases cited; *Strong v. Taylor School Township*, 79 Ind. 208; *Loehr, Guard., v. Colborn*, 92 Ind. 24; *Reynolds v. Shirk*, 98 Ind. 480; *Malott v. Goff*, 96 Ind. 496.

It is clear that the complaint is not insufficient for the reason urged by appellant.

It is next urged that the court erred in overruling appellant's motion for a new trial.

The causes assigned for a new trial were :

"1. The damages assessed are excessive.

"2. The allowance to Newton J. Gaskill for services rendered and money expended in caring for the mortgaged chattels is erroneous, unjust and contrary to law.

"3. The allowance to James A. Hedgecock for services rendered and money expended in caring for the mortgaged chattels is erroneous, unjust and contrary to law.

"4. The finding of the court is not sustained by sufficient evidence."

We have read the evidence, and it is clear that there is evidence which sustains the court upon every material point in its finding. There was evidence from which the court might have found a larger sum in favor of appellees than it did.

The real question presented in the motion for a new trial and the motion to modify the judgment is whether the court erred in making allowance to Hedgecock and Gaskill for their services in caring for and selling said stock of drugs and fixtures.

It appears from the evidence that Dewitt C. Bryant, on the 10th day of April, 1893, executed to appellees a mortgage on certain real estate and a stock of drugs to indemnify them as his sureties on promissory notes, administrator's, executor's and guardian's bonds. The

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mortgage was in the ordinary form of a real estate mortgage, and contained no provision for the possession of the personal property, nor any provision authorizing the sale thereof by the mortgagees. On the 11th of April, the mortgagees, the appellees in this case, entered into an agreement with Bryant, the mortgagor, which was reduced to writing, by which said Bryant and James H. Bryant took possession of said stock of drugs and fixtures as agents for the mortgagees, with full power to sell the same at retail or the whole stock, and apply the proceeds to the payment of reasonable wages to themselves, second to the purchase of such goods as should be necessary to replenish the stock, and, third, to the payment of the several obligations mentioned in the mortgage.

Afterwards, in April, Jacob Milroy recovered two judgments against Dewitt C. Bryant, and one Andrew J. Hale also recovered a judgment against him. Executions were issued upon these judgments, and on April 22 were levied upon said stock of drugs and fixtures, and a part of the real estate described in the mortgage. On the 28th day of April, Milroy and Hale, the plaintiffs in said judgments, entered into a written agreement with the mortgagees that notwithstanding the levy on said stock of drugs the mortgagees should proceed to sell the entire stock at a reasonable price, and upon such terms as might be determined upon by Hedgecock and Gaskill, mortgagees, and Kent, the attorney of Milroy and Hale, a committee selected by the parties to said agreement. The duties of the committee were to oversee the disposition of the stock of goods and see that the proceeds thereof were properly applied. Gaskill was appointed treasurer of the committee, to receive all money for goods sold and apply the same, first, to the payment of the necessary ex-

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penses, second, to the payment of the obligations secured by the mortgage.

Afterwards, on October 9, 1893, the committee, with the knowledge and consent of the mortgagor, mortgagees, and said Milroy and Hale, sold the stock of drugs and fixtures for \$6,101.50. Five thousand and two hundred dollars of the purchase-money was paid in real estate and the balance in cash.

On December 2, 1893, the sheriff, by virtue of a *venditioni exponas*, issued on the judgment in favor of *Milroy v. Bryant*, heretofore mentioned, sold a part of said mortgaged real estate to the appellant Goff. The amount bid at said sheriff's sale by Goff was more than sufficient to pay the Milroy and Hale judgment, and the balance of the amount paid by him at said sale, about \$1,200, was applied on an execution in the hands of the sheriff in favor of *Culver v. Bryant*, principal, and James A. Seawright and Edward C. Beaver, sureties. The Milroy judgments and the Culver judgments were rendered April 21, 1891, and executions were issued and levied at the same time. The mortgage sued upon was executed to Seawright, one of the mortgagees, to secure him against loss as surety on the note upon which said judgment in favor of Culver was rendered. The court found that the amount for which the drugs and fixtures were sold, \$6,101.50, was largely in excess of the value thereof, and that Hedgecock and Gaskill were entitled to compensation for services in selling said stock of drugs, stating the amount.

Appellant insists that the sale of the stock of drugs was a full satisfaction of the mortgage debt, and cites *Landon v. White*, 101 Ind. 249, to sustain this contention. That case is not in point. The personal property in this case was delivered by Bryant to the mortgagees under a written agreement, which, with the

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written agreement afterwards entered into, made full provision for all expenses and what amount should be applied on the liabilities secured by the mortgage, that was the amount realized after all expenses were paid, every step taken was consented to and acquiesced in by the mortgagor and mortgagees, and was also fully authorized by the agreements.

Appellant next urges that if the sale of the goods was not a satisfaction of the liabilities secured by the mortgage, the same should have been charged to the mortgagees at their full value. There is nothing in this contention, for the reason that the same was charged to the mortgagees as \$6,101.50, the amount for which they were sold, which the court found was largely in excess of their actual value.

It should be observed that appellant purchased a part of the mortgaged real estate long after the services of Hedgecock and Gaskill were rendered and after the goods were sold, and that he has no right to contest the allowances to Hedgecock and Gaskill, except as he may be subrogated to the rights of Seawright under the mortgage sued upon and the rights of Milroy as a purchaser of the mortgaged real estate at sheriff's sale on his, Milroy's, judgment against Bryant. Seawright and Milroy were each parties to the written agreement under which the services of Hedgecock and Gaskill were rendered, and we are not aware of any authority which would permit them to successfully resist a reasonable allowance for such services. They received the benefit of their services, which was rendered at their request and with their knowledge and consent. It is not a case where all were equally bound and had the same right to perform the services as in a partnership. But they were selected by the other interested parties to take care of and sell the stock of drugs, which they did. The other mortgagees had no power

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to take care of or sell the goods. This authority was given by the agreements to Hedgecock, Gaskill, Kent and Bryant. We think it may be inferred from the two agreements that compensation was to be paid for taking care of and selling the stock of goods. For these services Hedgecock and Gaskill were entitled as against the mortgagees at least to a reasonable allowance to be paid out of the proceeds of the sale of the goods. 27 Am. and Eng. Ency. Law, 181-184; *Muscogee Lumber Co. v. Hyer*, 18 Fla. 698, s. c. 43 Am. Rep. 332; *Gibson's Case*, 1 Bland Ch. (Md.) 138, s. c. 17 Am. Dec. 257 (266-274); *Ingraham v. Kirkpatrick*, 8 Ired. Eq. (N. C.), 62.

Appellant urges that they were mortgagees in possession, and that the rule is that a mortgagee in possession will not be allowed compensation for his trouble in taking care of the property, even though there is an agreement to that effect, citing Cobbey on Chattel Mortgages, section 932. While such may be the correct rule as between mortgagor and mortgagee, which we need not, and do not, determine in this case, it is certainly not the rule as between the mortgagees themselves. The question here is between two of the mortgagees and appellant, who claims under another mortgagee in the same mortgage. Here there was an agreement by which two of the mortgagees were authorized to take care of and sell the goods. The evidence shows, and the court found, that they rendered services under this agreement, and the value of said services is also shown by the evidence and found by the court.

We do not think the court committed a reversible error in making them an allowance. So far as appellant is concerned, he is not in a position to object to an allowance for the services mentioned, but he has the

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right to object if the allowance is unreasonable. He makes no such complaint, however.

We think the case was fairly tried, and that appellant has no just grounds for complaint.

The judgment is affirmed.

Filed April 15, 1896.

No. 16,726.

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144 423
150 497

ELECTIONS.—Registration Law, When Unconstitutional.—Imposing Burdens Upon one Class of Citizens not Borne by Others.—A registration law requiring a resident who shall have absented himself from the State for a period of six months or more since last so voting, or who shall have gone into any other State or Sovereignty with the intention of voting therein since last so voting, or during any absence in another State or Sovereignty shall have voted therein since last so voting, and also any person who shall not have been a *bona fide* resident of the county in which he resides at least six months before any such election, to register in the office of the clerk of the circuit court of the county in which he resides, at least 59 days prior to election, a notice that he claims to be a legal voter of such county, before being entitled to vote, is unconstitutional and void, as being in conflict with sections 2 and 4, of Article 2 of the State constitution relating to qualifications of electors as regards age and residence, as imposing burdens upon one class of citizens not borne by others.

From the Hendricks Circuit Court.

A. G. Smith, Attorney-General, and *A. C. Harris*, for appellant.

E. G. Hogate and *J. L. Clark*, for appellee.

COFFEY, J.—An act of the General Assembly, approved March 9, 1891, Acts of 1891, p. 350, provides

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that "Any person who, having been a resident of Indiana, and a qualified voter therein at any general election, shall have absented himself from the State for a period of six months or more since last so voting, or who shall have gone into any other State or Sovereignty with the intention of voting therein since last so voting, or during any absence in another State or Sovereignty, shall have voted therein, since last so voting, and also any person who shall not have been a *bona fide* resident of the county in which he resides at least six months before any election, shall, before being entitled to vote at such election in this State, register in the office of the clerk of the circuit court of the county in which he resides, a notice that he claims to be a legal voter in such county. Such registration shall be made at least fifty-nine days prior to any such election, and the notice shall state such person's name, age and place of residence * * both at the time of registration and during the period of four months prior thereto. * * * On the filing of any notice, as provided for in this section, it shall be the duty of such clerk to enter the name and residence of said elector and date of filing of said notice in a book furnished for said purpose, to be open at all times to the inspection of the public, and safely preserve said original notice, and deliver a certified copy of the same to the elector so registering; and on demand of any challenger or member of election board such elector shall be required to produce the same before being allowed to vote. * * Any person violating the provisions of this section * * shall be guilty of a felony," punishable by imprisonment and disfranchisement.

Assuming to act under the provisions of this law, the clerk of the Hendricks Circuit Court purchased the blanks necessary to carry out its requirements, for

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the cost of which the board of commissioners of that county made an allowance. This suit was instituted by the appellee against the appellant, as the auditor of the county, to enjoin him from drawing his warrant on the county treasurer for the payment of the allowance, on the ground that the act of the general assembly above referred to violates the constitution of the State and is, therefore, void. The circuit court overruled a demurrer to the complaint, and the appellant failing and refusing to plead further, a decree was entered forever enjoining the appellant, as auditor of the county, from drawing his warrant for the payment of such allowance.

It is assigned as error here that the circuit court erred in overruling the demurrer of the appellant to the complaint.

It will be seen, therefore, that the only question before us relates to the constitutionality of the law, the main provisions of which are set out above.

Section 2, Art. 2, of the constitution of the State, defines the qualifications of the electors of the State. It provides, among other things, that every male citizen of the United States of the age of twenty-one years and upwards, who shall have resided in the State during the six months, and in the township sixty days, and in the ward or precinct thirty days, immediately preceding the election, shall be entitled to vote in the township or precinct where he may reside.

Section 4, Art. 2, provides that "no person shall be deemed to have lost his residence in the State by reason of his absence, either on business of this State or of the United States;" and section 1, Art. 1, provides that "All elections shall be free and equal."

Section 14, Art. 2, provides for a general registration law.

It is conceded by the attorney-general, as well as

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by the other counsel for the appellant, that under the several constitutional provisions above referred to, the act of the general assembly now under immediate consideration cannot stand without a modification of the ruling of this court in the case of *Morris v. Powell*, 125 Ind. 281. It is claimed that the dissenting opinion of Mitchell, J., in this case expresses the rule by which we should be governed in determining the constitutionality of the law now before us, but after a careful reading of that able opinion, we are still of the opinion that it is faulty, in that it ignores the insurmountable objection that the Legislature has no power to divide the electors of the State into classes and impose upon one class burdens not borne by all alike.

In the opinion written by Olds, J., in that case, in which all the judges, except Mitchell, concurred, it was said: "Indeed, it seems to us to be beyond controversy that if the present act can be upheld, aimed as it is at a class of traveling men, and men whose business, either of a public or private character, or ill health, may take from the State six months, and persons who may be required to move from one county to another to obtain employment, within six months preceding an election, and imposing, as it does, a burden upon this class of citizens, which is imposed upon none other, then the Legislature may enact a valid law relating to any class, designating them by nationality, place of birth, religious belief, professional, or business pursuits, and require them, and none other, to register."

So Elliott, J., in a separate opinion, in that case, in speaking of the law then under consideration, said: "It violates the constitution by assuming to classify voters into those who remain continuously in the State and those who temporarily absent themselves from it. Where the constitution makes a classifica-

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tion, a different one cannot be made by the Legislature. Our constitution does make a classification, for it specifically provides who shall be eligible to vote. * * * The general assembly has no power to enact a law operating through a classification exclusively its own."

The law now under consideration is subject to most of the constitutional objections urged against the law of 1889. It assumes to classify the voters of the State, and to impose upon one class burdens not borne by the others. Indeed, it seems to have been enacted in the very face of the decision in the case of *Morris v. Powell*, *supra*. But little can be said in addition to what was said in that case in elaboration of the objectionable features of this law. All we desire to add is, that it cannot be demonstrated by any course of sound reasoning, that an election held under a law which imposes upon one class of citizens burdens not borne by others, is equal. So far as we are informed, all legislation in this State prior to 1889, intended to regulate elections, was general and applied alike to all the citizens of the State. Legislation like that we are now considering is a departure from the long established and approved practice in this State. It is plainly in conflict with our organic law and is, for that reason, void.

The court did not err in overruling a demurrer to the complaint in this case.

Judgment affirmed.

Filed Oct. 25, 1892; petition for rehearing overruled December 19, 1895.

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No. 17,721.

LANKFORD v. THE STATE.

APPELLATE PROCEDURE.—*Waiver of Error.—Brief.*—An alleged error is waived by failure to refer thereto in appellant's brief.

SAME.—*Sufficiency of Evidence.—Criminal Law.*—A conviction amply supported by the evidence will not be disturbed on appeal, no matter how strong the opposing evidence may be.

EVIDENCE.—*Incompetent.—Objection After Admission.—Appellate Procedure.*—An objection to incompetent evidence after its admission, without a motion to strike out the particular matter, will not be considered on appeal.

SAME.—*Objection, When too General.*—An objection to the admission of evidence must specifically designate the particular evidence objected to.

CRIMINAL LAW.—*Rape.—Prosecution by Information.*—One may be prosecuted for rape by affidavit and information, although a grand jury had been in session since his arrest and had been discharged without indicting him, under R. S. 1894, section 1748, subd. 1, authorizing a prosecution in that manner for all public offenses, except treason and murder, where the court is in session and the grand jury is not in session, or has been discharged.

SAME.—*Prosecution by Information.—Plea in Abatement.—Case Overruled.*—A plea in abatement to a criminal charge prosecuted by affidavit and information, alleging that there was a grand jury regularly drawn, and that the grand jury had not been discharged for the term when the affidavit and information were filed, is insufficient under R. S. 1894, section 1748, authorizing a prosecution in that manner, "where the grand jury is not in session, or has been discharged." (*State v. Boswell*, 104 Ind. 541, overruled.)

SAME.—*Information.—Plea in Abatement.*—A plea in abatement of a criminal charge by affidavit and information must negative all the provisions of the statute authorizing a prosecution of the offense in that manner.

From the Knox Circuit Court.

W. A. Cullop, C. B. Kessinger, H. Burns and J. S. Pritchett, for appellant.

W. A. Ketcham, Attorney-General, and *F. E. Matson*, for State.

144 428
147 600

144 428
149 412

144 428
156 345

144 428
157 149

144 428
161 277
161 505

144 428
165 473

144 428
166 589

144 428
169 386
169 508

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MCCABE, J.—The appellant was convicted on a charge of rape, alleged, in the affidavit and information on which he was prosecuted, to have been committed on one Dora Little, who was alleged to be a female child under the age of fourteen years.

The court, at the proper time, sustained a demurrer to appellant's plea in abatement and overruled his motion for a new trial and his motion in arrest of judgment.

Error is assigned on these rulings. The last one of the alleged errors is waived by appellant in failing to refer to it in his brief.

The substance of the plea in abatement is that, on the 25th day of October, 1894, the affidavit and information were filed in the Knox Circuit Court; that he had theretofore, to-wit: on July 2d, 1894, been bound over to the Knox Circuit Court by the mayor of Vincennes to answer said charge, and that he had been in custody ever since up to October 25, 1894; "that at the Knox Circuit Court there was a grand jury regularly drawn to investigate into high crimes and misdemeanors committed within the jurisdiction of the county prior to the first day of September, 1894, and during said term; that on the 25th day of October, 1894, when said affidavit and information were so filed against him said grand jury had not been discharged for said term, and no order of said court had been made relative to the discharge of the same for said term of court;" that he is not guilty of any crime as charged in said affidavit and information; that he had not been indicted by any grand jury for the same during said term or any other, and that during all of said time the Knox Circuit Court was in session.

It has been held by this court that to constitute a good plea in abatement of a criminal charge by affidavit and information, the plea must negative all

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the provisions of the statute authorizing a prosecution for the offense by affidavit and information. *State v. Drake*, 125 Ind. 367.

Prosecutions by affidavit and information of all public offenses, except treason and murder, are authorized by our criminal code in any one of the four cases, namely: 1. Whenever a person is in custody or on bail on a charge of felony or misdemeanor, except treason and murder, and the court is in session, and the grand jury is not in session, or has been discharged. 2. Whenever an indictment presented by the grand jury has been quashed, and the grand jury for the term, when such indictment is quashed, is not in session or has been discharged. 3. When a cause has been appealed to the Supreme Court and reversed on account of any defect in the indictment; and 4, Whenever a public offense has been committed, and the party charged with the offense is not already under indictment therefor and the court is in session, and the grand jury has been discharged for the term. R. S. 1894, section 1748 (R. S. 1881, section 1679). All these facts must be negatived and put in issue by a plea in abatement, or it will be insufficient on demurrer. *Hodge v. State*, 85 Ind. 561; *Elder v. State*, 96 Ind. 162; *State v. Drake*, *supra*.

Conceding, without deciding, that the facts essential to authorize a prosecution by affidavit and information in the two cases last named have been sufficiently put in issue by the plea, we think it does not put in issue the facts named in the first case, authorizing such a prosecution, namely, that "the grand jury is not in session or has been discharged." The non-existence of these two facts must be alleged.

It is alleged that the grand jury had not been discharged, which sufficiently negatives one only of the facts in question. But the non-existence of that fact

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is not enough, because its non-existence is not inconsistent with the fact that the grand jury is either in session or has never been impaneled. There is no allegation that the grand jury was then in session, or ever had been during the term. If it had not been so in session, the right to prosecute by affidavit and information was authorized by statute, as we have seen. Hence, the plea to be sufficient should have negatived the fact by alleging that the grand jury was in session, and thus put in issue the right to so prosecute. Instead of alleging that the grand jury was in session, the plea alleges that "there was a grand jury regularly drawn," but it nowhere alleges that such grand jury was ever impaneled or organized, or ever went into session. Without showing that the grand jury was ever in session during the term, it would be idle to allege that it had not been discharged. Such non-discharge would be perfectly consistent with the fact that such grand jury had never been impaneled, and therefore consistent with the right to prosecute by affidavit and information. But even if the allegation that there was a grand jury regularly drawn could be held equivalent to an allegation that it was impaneled and went into session, still the plea is insufficient because it nowhere states what term of court it was drawn for. There might have been a grand jury drawn for a subsequent term and not at the term at which appellant was prosecuted. In such case he could be prosecuted by affidavit and information. The law does not absolutely require a grand jury at every term of the circuit court. *Kennegar v. State*, 120 Ind. 176. But even if a grand jury had been in session since appellant's arrest and had been discharged without indicting him, is no reason why he may not be prosecuted by affidavit and information. *State v. Boswell*, 104 Ind. 541, upon this point is overruled, as it inter-

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polates into the statute a condition inconsistent with its plain provisions.

A plea in abatement must be strictly construed. *Musgrave v. State*, 133 Ind. 297; *Billings v. State*, 107 Ind. 54.

Therefore, the allegation that there was a grand jury regularly drawn is not equivalent to an allegation that such grand jury was impaneled, organized or went into session, nor that such grand jury had been in session. Hence, the court did not err in sustaining the demurrer to the plea in abatement.

The fourth and fifth reasons for a new trial relate to the testimony of Eliza Little, the mother of the prosecutrix. The testimony and objection thereto read as follows: "I know the witness, Jureau, who has testified in this case. He came to my house next morning, on the 8th of May, 1894, and told me about what Larkin Lankford, the defendant, had, the night before on the road from Vincennes, done to Dora, and then I spoke to her about it. The way I came to speak to her about it was that Jureau told me what he heard defendant say to her on the night before, to which statements the defendant at the time objected and excepted, for the reason that it was a conversation which affected him in his rights in this case, and such statements and conversations so given by the witness were not in the hearing and presence of the defendant."

An objection to incompetent evidence merely after its admission is generally unavailing. *Pence v. Waugh*, 135 Ind. 143; *Jennings v. Sturdevant*, 140 Ind. 641. Assuming without deciding that the testimony in question was incompetent, the record fails to show that appellant took such steps as he should have done to make his objection thereto available. It does not appear whether the testimony was given in answer to

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a question calculated to elicit the same, in which case to make his objection available he should have objected to the question, stating the grounds of his objection; nor does it appear to have been an answer not responsive to a proper question, but it appears to have been voluntarily given by the witness without being questioned. If objectionable evidence is volunteered by a witness, or given in an answer that is not responsive to a proper question asked or otherwise, before objection can reasonably be made, a motion should be made to strike out the particular matter which is considered improper. *Vickery v. McCormick*, 117 Ind. 594; *Clanin v. Fagan*, 124 Ind. 304; *Pence v. Waugh*, *supra*; *Jennings v. Sturdevant*, *supra*.

The failure to object by a motion to strike out was a waiver of the objection.

The fifth reason for a new trial relates to the testimony of the same witness as to a conversation with her daughter, the prosecutrix, the same morning. The 6th, 8th and 9th reasons for a new trial relate to certain testimony given over appellant's objection, by the witnesses, Leathers, Lake and Anthis, but no ground on which any of these objections are made is stated in the record.

An objection to the admission of evidence must state the ground of objection and must be sufficiently specific to designate the particular evidence objected to. *City of Delphi v. Lowery, Admx.*, 74 Ind. 520; *Clay v. Clark*, 76 Ind. 161; *Cressler v. Williams*, 80 Ind. 366; *Cox v. Rash*, 82 Ind. 519; *Shackman v. Little*, 87 Ind. 181; *Kuhns v. Gates*, 92 Ind. 66; *Noe v. State*, 92 Ind. 92; *Shade v. Creviston*, 93 Ind. 591; *Wabash, etc., R. W. Co. v. Tretts*, 96 Ind. 450; *Bottenberg v. Nixon*, 97 Ind. 106; *Shafer v. Ferguson*, 103 Ind. 90; *Grubbs v. Morris*, 103 Ind. 166; *Chapman*

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v. *Moore*, 107 Ind. 223; *Louisville, etc., R. W. Co. v. Jones*, 108 Ind. 551; *McKinsey v. McKee*, 109 Ind. 209; *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196; *Litten, Admr., v. Wright School Tp.* 127 Ind. 81; *Stanley v. Holliday*, 130 Ind. 464; *Fowler v. Wallace*, 131 Ind. 347. Otherwise the objection is deemed waived. *Bass v. State*, 136 Ind. 165.

It is made one of the grounds in the motion for a new trial that the evidence does not support the verdict, and it is urged in argument that it is not sufficient to show the guilt of the accused beyond a reasonable doubt.

While there is some conflict in the evidence, yet that part of it which tends to support the verdict is overwhelming and amply supports it. Under such circumstances we cannot reverse, no matter how strong the opposing evidence may be. *Deal v. State*, 140 Ind. 354. The court did not err in overruling the motion for a new trial. None of the errors alleged and urged in argument being available, the judgment is affirmed.

Filed April 1, 1896.

No. 17,879.

UPLAND LAND COMPANY v. GINN ET AL.

VENDOR'S LIEN.—Reservation in Note.—Where A sold land to B, taking a note for \$2,700 in part payment, and subsequently C sold land to A and agreed to take B's note in part payment, if it were a purchase-money note, and B thereupon executed a note to C for the amount of the unpaid purchase-price of the sale to A, and another note to A for the balance of the \$2,700 due A on the purchase by B, the note by B to C carried a vendor's lien on the land sold to B by A.

144	434
145	840

144	434
151	332
151	581

144	434
154	593

144	434
159	40

144	434
161	25

Upland Land Company v. Ginn et al.

From the Grant Circuit Court.

G. W. Harvey and *A. De Wolf*, for appellant.

Brownlee & Paulus, for appellees.

MONKS, J.—This action was brought by appellee, William Ginn, against appellant and the appellee William M. Brown, receiver of the Upland Glass Company, to recover the amount due on a promissory note executed by appellant, and have the same adjudged to be a vendor's lien on certain real estate owned by appellant.

Appellee, Brown, receiver, filed a cross-complaint to recover judgment on a promissory note alleged to have been given for the purchase-money for the same land, etc.

It was alleged in the complaint of Ginn, appellee, and the cross-complaint of Brown, receiver, that on April 11, 1893, one Wilhelm sold and conveyed a tract of land to appellant, and, for the purchase-money not paid in cash, took appellant's note for over \$2,700.00; that afterwards, on July 3, 1893, appellee, William Ginn, sold and conveyed a tract of land to said Wilhelm, for which he paid all the purchase-money except \$2,018.00; that on said day it was agreed between appellant, appellee, Ginn, and Wilhelm that for the purpose of securing the payment of \$2,018.00, the balance of the purchase-money due from Wilhelm to Ginn, appellant would execute to said Ginn its promissory note for \$2,018.00 of the purchase-money due from it to Wilhelm for the real estate purchased from him; that in compliance with said agreement, appellant did execute its note payable to appellee Ginn, whereby it promised to pay him \$2,018.00 of the purchase-money for the real estate conveyed by Wilhelm to appellant; that said note is due and unpaid; that appellant ex-

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ecuted its promissory note to said Wilhelm for \$722.00, being the amount of said purchase-money in excess of said \$2,018.00; that said note was sold and indorsed by said Wilhelm to the Upland Glass Company, of which company said Brown was afterwards appointed receiver; that said note is due and unpaid, etc.; that said appellant is wholly insolvent and has no personal property from which said notes can be paid. The complaint and cross-complaint each contains a prayer for a judgment upon the note sued on, and that the same be adjudged to be a vendor's lien on said real estate sold and conveyed by Wilhelm to appellant.

Appellant answered the complaint and cross-complaint by a general denial.

The cause was tried by the court, and a general finding made in favor of appellee, Ginn, on the complaint, and in favor of Brown, receiver, on the cross-complaint. Judgments were rendered on the finding, one in favor of appellee, Ginn, and one in favor of Brown, receiver, and the same were adjudged to be vendor's liens on said real estate, which was ordered to be sold for the payment thereof.

On motion of appellant the judgment was modified so that it provided that the real estate was not to be sold until the other property of appellant subject to execution was first exhausted.

Thereupon appellant filed a motion for a new trial, which was overruled.

The only error assigned calls in question the action of the court in overruling the motion for a new trial.

The motion for a new trial assigned the following causes therefore: "First. The judgment of the court and the finding thereof are not sustained by sufficient evidence. Second. The finding and judgment of the

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court are contrary to law and contrary to the evidence.”

It is conceded by appellant that appellee, Ginn, and Brown, receiver, were each entitled to a personal judgment against appellant, and that the court did not err in rendering such judgments.

There is no doubt, under the allegation in the complaint and cross-complaint, that the two notes executed July 3, 1893, by appellant were each given for the unpaid purchase-money for the real estate sold and conveyed by Wilhelm to appellant, and that said indebtedness was a vendor's lien on said real estate.

It is expressly alleged that each of said notes was executed by appellant for the unpaid purchase-money due from appellant to Wilhelm for the real estate sold and conveyed by him to it. As the court made a general finding for appellees, the only question is, was there any evidence which sustains this allegation in the complaint? We think there is evidence sustaining this as well as every other material allegation in the complaint and cross-complaint.

It appears from the evidence that appellee Ginn knew when he sold the real estate to Wilhelm that Wilhelm had a note for \$2,700.00 or more on appellant for a balance on real estate sold and conveyed by him to appellant, and that on July 3, when Ginn and Wilhelm and the appellant, by its officers, were together, Ginn expressed his willingness to take appellant's paper, which Wilhelm had, if it was purchase-money paper, and it was stated to him that it was purchase-money paper. They then agreed to divide said note held by Wilhelm on appellant by giving a note to Ginn for \$2,018.00 of the purchase-money appellant owed Wilhelm, and a note to Wilhelm for the remainder, \$722.00.

The note for \$2,018.00, executed to Ginn, was

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for the land sold by Wilhelm to appellant. The note for \$722.00 sued upon in the cross-complaint was given for the same consideration. According to this evidence there was no new debt created by appellant giving the note to appellee Ginn. The consideration for the two notes was the same as the note for \$2,700.00 held by Wilhelm, which was merely divided by giving the two notes mentioned. The \$2,700.00 unpaid purchase-money was a vendor's lien on the real estate held by appellant under the deed from Wilhelm, where the same was evidenced by a note for that amount, and it continued to be such when evidenced by the two notes executed July 3, one to Ginn and the other to Wilhelm. The right of appellees to enforce a vendor's lien under this evidence was the same as if Wilhelm had taken two notes, one for \$2,018.00 and the other for \$722.00 for the purchase-money from appellant, instead of one, and had transferred the one for \$2,018.00 to appellee, Ginn, and the other to Brown, receiver, as alleged. The assignment of notes given for the purchase-money of land transfers as an incident the vendor's lien. *Felton v. Smith*, 84 Ind. 485 (486); *Midland Ry. Co. v. Wilcox*, 122 Ind. 84 (91).

The controlling question in this case is, whether or not the debt owing is as to appellant a balance due for purchase-money on the land sold and conveyed to appellant by Wilhelm. *Nichols v. Glover*, 41 Ind. 24; *Boyd v. Jackson*, 82 Ind. 525; *Dwenger v. Branigan*, 95 Ind. 221; *Barrett v. Lewis*, 106 Ind. 120; *Otis v. Gregory*, 111 Ind. 504. As we have shown, there was evidence which sustains the finding of the court that it was.

Appellant does not seem to insist upon the proposition that the land was not chargeable with a lien for purchase-money on account of the \$722.00 note held by Brown, receiver, as assignee of Wilhelm.

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It is proper to suggest that as the motion for a new trial was as to the whole case, if the finding of the court was proper in favor of Brown, receiver, upon the issues joined on the cross-complaint, then the motion was correctly overruled, even though the evidence was not sufficient to sustain the finding in favor of the appellee Ginn. In such case, the motion should be for a new trial of the issues joined on the cross-complaint. *Parsons v. Stockbridge*, 42 Ind. 121; *First Nat'l Bank v. Williams*, 126 Ind. 423; 2 Elliott Gen. Pract. p. 1166, note 4 and cases cited; Elliott App. Proced., section 844, and notes.

There is no available error in the record.

Judgment affirmed.

Filed April 1, 1896.

No. 17642.

MEYER, ADMR., v. THE MANHATTAN LIFE INSURANCE
COMPANY.

144 439
157 462

HARMLESS ERROR.—*Striking Out Interrogatory Filed with Pleading.*—Striking out an interrogatory is harmless, if error, where it was not required to enable the party to adapt his pleadings to the facts of the case, and all the information that could have been obtained thereby is fully supplied by the evidence adduced upon the trial.

INTERROGATORIES.—*Filed with Pleading.*—*When Properly Stricken Out.*—Interrogatories in respect to some matter of opinion, the legal effect of some written instrument, or asking for a conclusion of law or an opinion of hypothetical questions, or requiring the giving of copies of documents, are properly stricken out.

INSURANCE.—*Life.*—*Surrender of Policy Without Demanding Paid-up Policy.*—*Forfeiture.*—No recovery can be had on an insurance policy providing for the issuance of a paid-up policy after payment of three or more premiums, if the insured surrenders his

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policy before its expiration by nonpayment of a premium, where the insured allowed his policy to lapse by nonpayment of a premium without demanding a paid-up policy.

VERDICT.—Court Directing Verdict.—Failure of Evidence.—Trial.—

A verdict is properly directed for defendant where the evidence introduced utterly fails to establish the cause of action stated in the complaint.

From the Marion Superior Court.

Finch & Finch, for appellant.

Miller, Winter & Elam, for appellee.

HOWARD, J.—This was an action against appellee, brought by the appellant, administrator, upon two separate policies of life insurance, issued by appellee to George F. Meyer, in the sums of \$5,000.00 and \$10,000.00, respectively.

The complaint alleges the issuance of the policies to George F. Meyer; that the same were not to become binding upon the company until countersigned by the agent of the company in Indianapolis; that he did countersign them and deliver them to the assured; that the assured paid the premiums upon said policies during the years 1864, 1865, 1866, 1867 and 1868; and that before the premiums for the year 1869 became due and payable, the appellee gave George F. Meyer notice that it would not receive said premiums except upon the condition, to-wit: that said Meyer would pay to appellee interest at the rate of 7 per cent., discounted in advance upon his then outstanding notes given for the premiums; that George F. Meyer had made no contract with appellee to pay such interest as a condition of the receipt of said premiums and succeeding premiums, and said requirement and demand were wrongful, unlawful and oppressive, and said Meyer was not compelled to comply therewith, and did not comply therewith, and thereupon said appel-

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lee marked said policies upon its books as cancelled and void.

It is further alleged that said Meyer was ready, willing, and able to pay said premiums that were due in 1869, and the succeeding premiums on said policies, and would have paid all of said premiums but for said wrongful and unlawful demand; and that his refusal to comply with said wrongful demand did not affect his rights or the rights of appellant under said policies; and said policies remained in full force; and then alleges the compliance with all the conditions of said policies by said Meyer and plaintiff; the death of Meyer and proof of death, and denial of liability by the appellee.

The insurance was on the ten-year annual payment plan, under which the holder of the policies was entitled to participation in the profits of the company. The policy for \$5,000.00, numbered 12,911, was issued on the 22d of September, 1864; and that for \$10,000.00, numbered 14,725, on the 3d day of June, 1865. Both were for the sole use of the assured. It was a condition of each policy that after the receipt by appellee of not less than three annual payments of premiums, and on the surrender of the policy on or before it should expire by nonpayment of the fourth or any subsequent annual premium, the appellee would issue a policy not subject to any further charge for annual premiums, payable at the death of the assured.

The first paragraph of the complaint counts upon the policy for \$5,000.00, and the third paragraph, upon the policy for \$10,000.00, the averments upon each of said paragraphs, except the amounts, being the same. The second paragraph of complaint is upon the provision of the policy for \$5,000.00 for paid-up insurance, such provision being that the insured should be entitled to as many tenths of the principal sum insured

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as there shall have been annual premiums paid on said policy; and alleges that five premiums were paid, and, therefore, the appellant is entitled to five-tenths of the sum insured. The fourth paragraph counts upon the provision in the policy for \$10,000.00 for paid-up insurance, and alleges that four premiums were paid, and, therefore, the appellant is entitled to four-tenths of the sum insured.

There was an answer in general denial, also special answers. In the special answers it was averred that at the request of the assured the contracts in the policy requiring premiums to be paid in cash were modified by an agreement that the company should accept notes for one-half of the annual premiums, with a further agreement in consideration thereof that these notes should be New York contracts and consequently bear interest at the rate of 7 per cent., payable annually in advance; that during all the years that premiums were paid, and adjusted by the insured by giving such notes, the interest was paid thereon at the rate of 7 per cent. in advance, according to the contract and without objection; that the appellee was a mutual company and its charter a part of the contract, which charter required that policies should be forfeited for non-payment of premiums, and when so forfeited the insured should forfeit all claims for previous payments made by him; that in the year 1869 the statement of the premium due in that year was rendered precisely as it had been in former years and the insured made no objection whatever, but simply did not pay or offer to pay the premium or any part thereof, and did not offer to pay any of the notes he had executed or any interest thereon, but allowed the whole premium to remain unpaid without explanation, protest or tender of any kind; that no demand whatever was ever made for a paid-up policy,

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nor was there any offer to surrender the old policies before they were forfeited, which was required in order that the insured might become entitled to paid-up policies; that the company was at all times ready to issue paid-up policies upon demand and surrender of the old policies before forfeiture; that on account of the failure to pay premiums in any way, the policies sued on by insured became wholly forfeited by their terms, and that the insured never became entitled to any paid-up policies, nor was the company liable in any way upon the original policies after such forfeiture.

For reply to this answer the appellant alleged that the notes given for premiums were printed in New York, and had the name "New York" printed upon them; but in fact they were signed in Indiana and were delivered to appellee by said Meyer in Indiana; and that said Meyer made no agreement that said note should bear any rate of interest in excess of 6 per cent., which was the lawful rate of interest in Indiana; that the premiums on the policies were payable, as they matured, to the appellee in the city of Indianapolis, Indiana, and that the premiums on said policies that were paid to appellee were paid in Indianapolis, Indiana; that there was nothing in the contract between the said Meyer and appellee to warrant the appellee in demanding interest on said notes at the rate of 7 per cent., and that the appellee wrongfully made such requirement and demand of said Meyer, and notified him that no premium would then (1869) or thereafter be received on said policies unless interest at the rate of 7 per cent. on said notes was paid with said premiums, and plaintiff says that the defendant did not at any time withdraw said notice and demand, and the defendant could not then or thereafter, while said demand, requirement and

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notice were adhered to, cancel said policies, and the same continued in full force and effect.

Certain interrogatories were filed for the company to answer. A number of these were stricken out on appellee's motion and others answered. Trial by jury. Evidence heard, and at its close an instruction to find for the appellee. Motion for a new trial overruled. Judgment for appellee, and appeal to the general term. Case affirmed in general term, and appeal to this court.

Here the error assigned is the affirmance of the judgment by the general term.

In the general term the errors assigned were:

First. Overruling appellant's motion to strike out parts of appellee's answer.

Second. Overruling appellant's demurrer to appellee's answer.

Third. Overruling appellant's motion for a new trial, which motion assigned as reasons:

(i.) The ruling of the court in striking out interrogatories and parts of interrogatories.

(ii.) Error in instructing the jury for the appellee.

(iii.) Error in refusing to give to the jury instructions asked by the appellant.

(iv.) That the verdict of the jury was contrary to the evidence and to the law and not sustained by the evidence.

Fourth. Error of the court in instructing the jury to return a verdict for the appellee.

Of these questions involved in the ruling at general term, those discussed here are:

First, the ruling on the motion to strike out interrogatories;

Second, the instruction to return a verdict for appellee.

Of the ruling of the court in striking out interroga-

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tories and parts of interrogatories, counsel for appellee say:

“It would be quite unprofitable to discuss this ruling with respect to each interrogatory. We believe it will be apparent upon reading the several interrogatories stricken out and those parts stricken from certain others, that there was no error in the ruling made with respect to any of them. In most cases, inquiry was made with respect to some matter of opinion, the legal effect of some written instrument, or a conclusion of law was asked with respect to certain facts. In a few instances the appellee was called upon to give opinions upon certain hypothetical questions or to give copies of documents more or less voluminous. It needs no argument to show that rulings striking out such interrogatories were properly made. A party interrogated under the practice prevailing in Indiana can not be required to state conclusions of law, answer hypothetical questions, determine the law upon facts stated or set forth copies of instruments. The law provides ample means of obtaining copies of documents which may be used in a law suit, but they cannot be obtained by interrogatories.

“We believe, however, that counsel and court may well be spared any detailed examination of these rulings with respect to each interrogatory, for the reason that there is no suggestion in the record or in appellant’s brief that he was in any way injured by them. Interrogatories filed with pleadings are permitted to enable a party to better prepare his case for trial or adapt his pleadings to the facts of the case. There is no suggestion anywhere in this record or in appellant’s brief that he lacked any information upon any subject, and by reason thereof was prejudiced or put to the slightest inconvenience in preparing his case

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for trial. Upon the trial itself, appellant called and examined Jacob L. Halsey, first vice president of the appellee, and examined him fully as to every subject covered by the interrogatories, excepting only such matters as depended upon written instruments. This examination constitutes by far the greater part of the oral evidence in the cause. It would appear that no representative of the appellee who might have answered the interrogatories stricken out, if they had remained in the record, could have done so more fully and completely than did Mr. Halsey upon the witness stand. The testimony of this witness was supplemented, as fully appears from the bill of exceptions, by all the competent documentary evidence which could have been furnished under any interrogatories stricken out."

It is enough, perhaps, for us to say that the foregoing contentions by counsel for appellee are fully sustained by the record. We do not think, in the first place, and for the reasons stated by counsel, that the court committed any error in striking out any of the interrogatories or parts of interrogatories, as complained of; and, in the second place, even if there were any error in such ruling, it could be only a harmless error, inasmuch as all information that might thus have been obtained was fully supplied by the evidence found in the record.

At the close of the evidence, the court, on motion of appellee, directed the jury to return a verdict in its favor. The principles applicable to a ruling on a motion to require a jury to return a verdict in favor of the plaintiff or the defendant are the same as those which apply to a ruling upon a demurrer to the evidence. *Oleson v. Lakeshore, etc., R. W. Co.*, 143 Ind. 405 (32 L. R. A. 149), and cases cited; *Faris v. Hoberg*, 134 Ind. 269; Elliott App. Proced., section 687; El-

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liott Gen. Pract., sections 854, 887, 888, 889, and authorities cited; *Parks v. Ross*, 11 How. (52 U. S.) 361; *Merrick's Exr. v. Giddings*, 115 U. S. 300; and see *Palmer v. Chicago, etc., R. R. Co.*, 112 Ind. 250.

In Work's Pract., section 789, it is said: "The rule is that where there is any evidence, however slight, tending to prove any fact essential to the maintenance of the case, as to that fact the question as to the sufficiency of the evidence to establish it is for the jury, and applying the same rule to the whole case, if there is any evidence, however slight, to sustain a cause of action or defense, the question must be left to the jury; but where there is no evidence to sustain a cause of action or defense the court may, and should, instruct the jury to find against the party having the burden of the issue."

The weight of authority, as Judge Elliott says in his excellent work on General Practice, section 854, *supra*, is that the case should be taken from the jury when the evidence, measured by the rules of law, is insufficient to entitle the party to a recovery, or where it utterly fails to establish the cause of action stated in the complaint. A mere scintilla of evidence in favor of the cause of action, or the defense, will not be sufficient to prevent the case from being taken from the jury, or to prevent the court from directing a verdict.

Judged by the foregoing principles, the court did not err in directing the jury to return a verdict for appellee. The substantial elements of appellant's cause of action were without any support from the evidence.

The policies were ten-year annual payment policies; and it was expressly provided in each policy that "in case the said George F. Meyer shall not pay the said premiums on or before the day hereinbefore mentioned for the payment thereof, then, and in every such case, the said company shall not be liable for the

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payment of the sum assured or on any part thereof; and this policy shall cease and determine." Also, that "in every case where this policy shall cease, or become null and void, all previous payments made thereon shall be forfeited to the said company." And, again, "The premiums are always due on the several days stipulated in the policy; and all risk to the company commences at the time of the actual payment of the first premium, * * * and continues until the day named in the policy for the payment of the next premium, at 12 o'clock, noon, and no longer."

The first policy was issued in 1864 and the second in 1865, each, as already said, on the ten-year payment plan. But it is admitted that payments were made only in the years 1864, 1865, 1866, 1867 and 1868; and that on failure to make payments in 1869 the policies were both forfeited.

As a reason for not making payments in 1869 or afterwards, it is said that, while the policies provide only for the payment of cash premiums, yet the parties made an agreement by which one-half of each year's premium was to be paid by the promissory note of the assured, with interest discounted in advance. These notes, with interest at 7 per cent., were given each year, and the interest paid with the annual premium until the year 1868; after which no notes were given and no interest or premiums paid.

It is alleged in the complaint that before the premiums for the year 1869 became due and payable the appellee gave George F. Meyer notice that it would not receive said premiums except upon the condition that he would pay interest at 7 per cent., discounted in advance, upon his then outstanding notes. It is therefore claimed that, said requirement being wrongful and unlawful, the said Meyer was not compelled to comply therewith, and was thereby excused

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from making further payment of premiums; and the *Phoenix Mutual Life Ins. Co. v. Hinesley*, 75 Ind. 1, is cited in support of the contention so made. The case, however, as we think, is not in point.

In the Hinesley case the appellant declared the policy forfeited "upon a tender of performance by the appellee of her part of the modified contract." In the case before us the evidence totally fails to show that the appellee company ever gave the assured any such notice as alleged, to-wit, that it would not receive the premiums except upon condition that he would pay interest at 7 or any other rate per cent. upon his outstanding notes. The evidence simply shows that the company sent the renewed receipts for 1869 to its agent at Indianapolis, with itemized statements of premiums, notes and interest due, as had been done each preceding year since the issue of the policies. The sending of such renewed receipts would not of itself have been notice that the company would not receive the premiums due in accordance with the terms of the policies. Besides, there was no evidence to show whether or not the agent ever communicated a knowledge of such renewed receipts for 1869 to the assured. Neither is there any evidence, as in the Hinesley case, that the assured ever tendered performance of his part of the contract of insurance for the year 1869, or for any year thereafter, or that he offered to pay the premiums due that year by the terms of his contracts of insurance, or by any modified terms of such contracts. There was not a particle of evidence given upon the subject.

It is further alleged that Meyer was ready, willing and able to pay said premiums that were due in 1869, and the succeeding premiums, and would have done so but for said wrongful and unlawful demand of ap-

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pellee. Not a scintilla of evidence was given to establish this allegation. Whether this alleged demand of the company for unauthorized interest was ever made, or, if made, whether this was the cause of the refusal of the assured to pay his premiums; or whether he was ready and able to pay such premiums; or whether he abandoned his insurance for any other cause, we are not informed by any evidence in the record. The allegations are abundant and sufficient; but the proof is wholly wanting.

In support of the second and fourth paragraphs of the complaint, which count on the recovery, respectively, of five-tenths and four-tenths of the respective policies, counsel say that they are entitled to recover by the terms of the policies themselves. It was a condition of each policy, and this is also alleged in the complaint, that after the receipt by the company of not less than three annual premiums, "and on the surrender of said policy on or before it should expire by the non-payment of the fourth or any subsequent annual premium," the company would issue a paid-up policy for as many tenths of the sum insured as there were premiums paid. It is admitted that the policies were forfeited for non-payment of premiums for the year 1869; and there is no evidence that the assured before the date of such forfeiture made any effort to secure paid-up policies in accordance with the terms of his contract of insurance. The contract of insurance, in the policy itself, stipulated the terms and conditions upon which paid-up policies would be issued. The assured failed to comply with these terms, or to make any demand for such paid-up policies, until, by the terms of his contract, a forfeiture of all his rights thereunder had taken place. Having therefore failed to demand a paid-up policy before the lapse of the original policy, his administrator cannot now recover

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anything under the terms of that original contract.

So it was held in *Willcuts v. Northwestern Mutual Life Ins. Co.*, 81 Ind. 300, that a member of a life insurance company such as that in the case at bar, is not entitled to a proportionate part of the amount of his policy of insurance, merely because a part of the premium was paid, and particularly in case the conditions of the policy provide that if the premiums are not paid when due the policy shall cease. Such a recovery, like that of the whole face of the policy, must be only in accordance with the terms of the contract. The principle of a recovery upon the *quantum valebat* has no application; for such a contract of insurance is an indivisible one. See also *Sheerer, Guard., v. Manhattan Life Ins. Co.*, 20 Fed. Rep. 886; *Lake Shore, etc., R. W. Co. v. Richards*, 152 Ills. 59 (30 L. R. A. 33).

There was a total failure of evidence to support the material allegations of the complaint.

Judgment affirmed.

Filed April 2, 1896.

No. 17,677.

ARCHIBALD v. LONG, EXECUTOR.

APPELLATE PROCEDURE.—*Special Finding Silent as to Material Fact.—Presumption.*—A material fact will be presumed, on appeal, to be against the party who was obliged to prove it, where the special finding is silent in regard thereto.

EVIDENCE.—*Burden of Proof.—Decedent's Estate.—Widow's Rights.—Election.*—One seeking to subject all of a testator's land to payment of his debts on the ground that the widow did not elect to take under the law within a year as required by section 2666, R. S. 1894, has the burden of proving such fact.

144	451
149	367
149	378
152	314
144	451
155	338
144	451
160	240
160	698
144	451
166	360
167	558
144	451
169	160

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WILL.—Election by Widow.—The failure of a widow to affirmatively elect within a year after probate of the will to accept the provision made by law, as required by section 2666, R. S. 1894, will be deemed an election to accept the provisions made by the will in place of the provisions by law.

From the Kosciusko Circuit Court.

J. H. Brubaker and *L. W. Royse*, for appellant.

S. J. North and *W. D. Frazer*, for appellee.

HACKNEY, C. J.—The facts specially found in this case were that Joel Long died testate, August 25, 1887, the owner in fee simple of lands in Kosciusko county of the value of \$13,500, and personal property of the value of \$3,002; that his widow and five children survived him; that by his will he devised all of said lands to his wife during her life, subject to certain support to certain of his children, and an interest in the products to his son, Elisha, and the personal estate was bequeathed to the widow and said son in trust for the management of the lands and the payment of the debts of the testator; that the provision for his widow was in lieu of all of her interest in his estate excepting the sum of \$500, allowed her by law as his widow; at the time of his death he was indebted in the sum of \$17,500, of which \$7,500 was secured by mortgages of said lands; of said personal estate the widow took said \$500 as her statutory allowance and, in June, 1888, said Elisha, as executor of said estate, petitioned the circuit court to sell real estate to pay debts of said estate; in said petition it was alleged, in addition to the facts as to the condition of the estate, that the executor could not proceed under the provisions of the will and satisfy the demands of the creditors, and that it was necessary to sell two-thirds of said real estate.

The widow and all of the children were parties to

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the petition, and appeared in open court and consented in writing "to an order of court for the sale of so much of said real estate as might be liable for the payment of the debts of the testator," and thereupon the court ordered the sale of the undivided two-thirds thereof. Upon said order said executor sold said two-thirds for \$9,058. The said sum, together with the personal property of the estate, is wholly inadequate to pay the debts of the estate. The appellant is a creditor and the appellee has been appointed and qualified as executor of the estate. As conclusions of law upon said facts, the court found that three-fourths of said real estate had been and were liable for the debts of said estate, and that two-thirds having been sold, the executor should proceed to sell an additional undivided one-twelfth.

The appellant insists that the whole of the remaining undivided one-third of said lands was subject to sale for the payment of the debts of the estate. The theory upon which this insistence proceeds is that the widow failed to elect to take her interest in the estate, under the law, and is conclusively presumed to have elected to take under the will; that having taken under the will the devise to her was subject to the payment of the debts and that she could not hold either the one-third or the one-fourth of the estate against creditors as if she had taken under the law.

It seems to be conceded by the appellee's counsel that if the widow had taken under the will all interest in the entire lands would have been liable for the debts. See the following authorities cited by the appellant in support of this proposition: *Langley v. Mayhew*, 107 Ind. 198; *Hurley, Admr., v. McIver*, 119 Ind. 53; *Draper v. Morris*, 137 Ind. 169; *Miller v. Buell*, 92 Ind. 482; *Kayser v. Hodopp*, 116 Ind. 428; *Fosher v. Williams, Exr.*, 120 Ind. 172.

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Nor does the appellee directly question the proposition that a widow's failure to make an affirmative election within one year after the probate of the will, as required by section 2666, R. S. 1894, will be deemed an election to accept the provision made by the will and a rejection of the provision made for her by the law. That said proposition is the settled law, see *Hurley v. McIver*, *supra*; *Fosher v. Guilliams*, *supra*; *Draper v. Morris*, *supra*; *Garn, Exr., v. Garn*, 135 Ind. 687. However, it is insisted, on behalf of the appellee, that if the issue was properly tendered by the petition, and that it was is denied, the appellant was required to prove the fact, which should have been specially found, that the widow did elect to take under the will or that she did not elect to take under the law. There is no disputing the proposition that where the special finding is silent as to a material fact that fact must be taken to be against the party who was obliged to prove it. *Meeker v. Shanks*, 112 Ind. 207; *Cincinnati, etc., R. W. Co. v. Gaines*, 104 Ind. 526; *Kehr v. Hall*, 117 Ind. 405; *Fletcher v. Martin*, 126 Ind. 55; *Town of Freedom v. Norris*, 128 Ind. 377; *Elliott App. Proced.*, section 757, n. 3.

If the widow took under the law there can be no question, and appellant suggests none, that she was entitled to one-fourth of the real estate free from the appellant's claim as a creditor of the testator.

It was upon the theory that the widow did not take under the law that the appellant proceeded in the court below, though it must be conceded that his petition was at least indefinite, since his only allegation upon this question was that all of the land "is subject to sale for the payment of the debts of said estate." The court's conclusion of law that the widow was entitled to retain one-fourth of the land could

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stand only upon the theory that she had not taken under the will. The special finding was silent as to her election.

It remains, therefore, but to inquire whether the appellant was obliged to affirm that the widow accepted the provisions of the will or that she did not elect to take under the law. The acceptance of the provisions of the will required no affirmative action, and her mere silence until after one year from the probate of the will would be deemed an election to take the provisions made by the will. If she declined the provisions of the will, the statute required her to take special affirmative action, namely: to file within such year an election, written and acknowledged. At the close of the year her rights were susceptible of affirmative proof. Her election to take under the will would appear from the failure to file a declaration to the contrary, a fact as easily proven, though negative, as the fact that she may have renounced the will.

This fact was essential to the appellant's theory of the case, it was upon this fact that his right existed. If treated as a negative, it is the rule "that where a negative is essential to the existence of a right, the party claiming the right has the burden of proving the negative." *Boulden v. McIntire*, 119 Ind. 574; *Goodwin v. Smith*, 72 Ind. 113; *O'Kane v. Miller*, 3 Ind. App. 136; *City of New Albany v. Endres*, 143 Ind. 192. We cannot presume that the widow did not elect to take under the law because of the silence of the special finding. By the authorities already cited, it will be seen that no intendments are indulged in favor of the party holding the burden of the issue, beyond the scope of the facts specially found. The facts found, therefore, do not require the conclusion that the widow accepted the provisions of the will. The appellant's learned counsel have not

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avored us with any discussion or suggestion upon this branch of the case, and we are without their views upon the question.

The judgment of the circuit court is affirmed.

Filed April 2, 1896.

No. 17,763.

KAUFFMAN, ADMR., v. THE CLEVELAND, CINCINNATI,
CHICAGO AND ST. LOUIS RAILWAY CO.

144	456
153	160
144	456
157	22

DAMAGES.—*Death by Wrongful Act.—Contributory Negligence.—Burden of Proof.—Court Directing Verdict.*—A verdict is properly directed for defendant in an action for negligently causing the death of plaintiff's intestate, where there is no evidence that the intestate was free from contributory negligence, although there is no evidence of negligence on his part contributing to the accident.

From the Elkhart Circuit Court.

H. C. Dodge, for appellant.

B. K. Elliott, W. F. Elliott, Baker & Miller and *C. E. Cowgill*, for appellee.

MCCABE, J.—The appellant, as the administrator of the estate of one Willam M. Cobbum, deceased, sued the appellee to recover damages sustained by the widow and children of the deceased, resulting to them on account of his death, which is alleged to have been caused by the negligence of the appellee, and without any fault or negligence on the part of the deceased. The issues joined were tried by a jury. At the close of the plaintiff's evidence the court instructed the jury to return a verdict for the defendant, which they

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accordingly did. The court rendered judgment on such verdict over appellant's motion for a new trial.

The principal and only material reason assigned for a new trial is the action of the trial court in directing a verdict for the defendant. Such an action as this is purely statutory, and the statute that authorizes it does so upon the condition that the facts are such as that the deceased might have maintained the action, had he lived, for the injury resulting from the same act or omission. R. S. 1894, section 285 (R. S. 1881, section 284). Therefore, the plaintiff must, in order to recover in this class of cases, allege and prove the same facts that are required to warrant a recovery by a plaintiff who sues for damages on account of injuries resulting from the defendant's negligence. And in that class of cases it must be alleged and proved, not only that the defendant's negligence was the proximate cause of the injury, but that the injured person was free from negligence contributing to such injury. *Smith v. Wabash R. R. Co.*, 141 Ind. 92; *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 31; *Indiana, etc., R. W. Co. v. Hammock*, 113 Ind. 1; *Ohio, etc., R. R. Co. v. Hill, Admx.*, 117 Ind. 56; *Cincinnati, etc., R. W. Co. v. Howard*, 124 Ind. 280 (8 L. R. A. 593); *Louisville, etc., R. W. Co. v. Stommel*, 126 Ind. 35; *Mann v. Belt R. R., etc., Co.*, 128 Ind. 138; *Pennsylvania Co. v. Meyers, Admx.*, 136 Ind. 242; *Lake Erie, etc., R. R. Co. v. Stick*, 143 Ind. 449; *Lamport, Admx., v. Lake Shore, etc., R. R. Co.*, 142 Ind. 269; *Cincinnati, etc., R. W. Co. v. Duncan*, 143 Ind. 524; *Oleson v. Lake Shore, etc., R. W. Co.*, 143 Ind. 405 (32 L. R. A. 149).

The injury and death in this case were caused by the decedent getting caught between the bumpers, or dead woods, of two box cars at a street crossing in the city of Goshen, and was thereby crushed to death.

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The train, or cars, had been uncoupled, or separated, so as to leave a space to avoid obstruction of travel along the street until the trainmen were done switching and could pull out of the way. It was about 11 o'clock a. m., though a severe snow storm was blowing so that it was difficult to see more than three or four rods away. The decedent started from his home in East Goshen to go west along Lincoln avenue across the appellee's tracks, and, as is supposed, in attempting to pass through such open space between the cars, got caught and killed. No one saw him get killed or caught, nor did any one see him make the attempt to cross. Consequently, there is no evidence whatever as to what degree of care he used or that he used any care to avoid the injury.

But it is earnestly insisted that the jury might have inferred, and had a right to draw the inference that he was free from contributory fault or negligence, from the fact that there was nothing in the evidence tending to show contributory negligence. But it has been expressly ruled to the contrary by this court in *Ry. Co. v. Howard, supra*, and in *Cincinnati, etc., R. W. Co. v. Duncan, supra*.

Therefore, there being no evidence to establish one of the indispensable elements of the plaintiff's cause of action, there was nothing to be determined but a simple question of law. And that question was, can a plaintiff recover for negligence without proving that the injured person was free from fault or negligence contributing to such injury? It was the duty of the trial court to determine that question itself. It could neither escape nor avoid the duty. It did that duty correctly by directing the jury to return a verdict for the defendant. *Lamport v. Lake Shore, etc., Ry. Co., supra*; *Engerer v. Ohio, etc., R. W. Co., 142 Ind. 618*; *Oleson v. Lake Shore, etc., R. W. Co., supra*.

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There was no error in overruling the motion for a new trial.

Judgment affirmed.

Filed April 2, 1896.

No. 17,778.

MCDONALD v. THE PITTSBURGH, CINCINNATI, CHICAGO
AND ST. LOUIS R'Y CO.

144	459
150	168

144	459
1171	373

ACTION.—By Father for Death of His Bastard Child.—No Right of Action.—The father of an illegitimate child has no right of action for the child's death, under section 267, R. S. 1894, giving a father a right of action for the death of a "child," although the mother is dead and the child had been acknowledged by the father and had no guardian or next of kin except him.

From the Elkhart Circuit Court.

O. H. Montgomery and *J. B. Brown*, for appellant.

S. Stansifer, for appellee.

MONKS, J.—Appellant brought this action against appellee under section 266, R. S. 1881 (section 267, R. S. 1894), to recover damages for the death of a minor, alleging in his complaint that said deceased was his son.

Appellee filed an answer, alleging in substance, that the deceased was a bastard, begotten and born out of wedlock, and that appellant never married the mother of said deceased and never adopted him by the order of any court. A demurrer for want of facts to this answer was overruled.

To this answer appellant filed a reply, alleging in substance that the allegations of said answer are

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true, but that the deceased was his illegitimate child, and that when but six months old appellant received him from his mother and relieved her of his care and custody, and acknowledged him as his son, and afterwards discharged every duty as a parent towards him, and received from him all the services, obedience and respect due from a legitimate son; that his mother abandoned him and is deceased; that such deceased son has no guardian or next of kin except only appellant.

To this reply appellee filed a demurrer for want of facts, which was sustained. Appellant refusing to plead further, judgment was rendered in favor of appellee.

The errors assigned call in question the action of the court in overruling appellant's demurrer to the answer and in sustaining appellee's demurrer to the reply.

Section 266 (267), *supra*, upon which this action is predicated, is as follows:

"A father, or in case of his death or desertion of his family or imprisonment, the mother may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward."

As the right to recover damages for the death of a human being is purely statutory, the statute must be strictly construed, and before appellant can recover he must bring himself clearly within its terms. When the statute specifies who may bring such action, only those persons named can maintain it. If no such person exists, then no recovery can be had. *Thornburg v. American Strawboard Co.*, 141 Ind. 443, and cases cited.

At common law a bastard had no father, and was considered the son of nobody, he was sometimes called *filius nullius* and sometimes *filius populi*. 1 Black. Com. 458-459; 2 Kent Com. 212; *Simmons v. Bull*, 21

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Ala. 501, 56 Am. Dec. 257, and note 258; *Higgins v. Bicknell*, 82 Ill. 505, 25 Am. Rep. 339; *Marshall v. Wabash R. R. Co.* (Sup. Ct. Mo), 25 S. W. Rep. 179.

It is said in Blackstone's Com. 459: "A bastard cannot be heir to any one, neither can he have heirs, but of his own body; for being *nullius filius* he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived."

It is a rule of construction that *prima facie* the word child or children, when used either in a statute or will, means legitimate child or children, that is, that bastards are not within the meaning of the term child or children. *Thornburg v. American Strawboard Co.*, *supra*; *Marshall v. Wabash R. R. Co.*, *supra*; *Dickinson, Admx., v. Northeastern R. W. Co.*, 2 Hurl. and C. 735; *Harkins v. Philadelphia, etc., R. R. Co.*, 15 Phila. 286; *Gibson v. Midland R. W. Co.*, 2 Ont. 658; *Marshall v. Wabash R. R. Co.*, 46 Fed. R. 269 (273); *Good v. Towns*, 56 Vt. 410; *Higgins v. Bicknell*, *supra*; *Dorin v. Dorin*, 13 Moak Eng. Rep. 90, L. R., 7 H. L. 568; *Hill v. Crook*, 7 Moak Eng. Rep. 1, L. R., 6 H. L. 265; *Barnes v. Greenzebach*, 1 Edwards Ch. 41; Waits Actions and Def. 49; 3 Am. and Eng. Ency. of Law, 229, notes on pages 230-233; 11 Am. and Eng. Ency. of Law, 870; 1 Beven Negligence, 250; Patterson Railway Acc. Law, section 409, p. 492; Tiffany Death by Wrongful Act, section 85; 1 Shear. and Redf. Negl., section 13.

Dickinson v. Northwestern R. R. Co., *supra*, was an action brought under the statute 9 and 10 Vict. c. 93, known as Lord Campbell's Act, passed in 1846. That act provides "that every such action shall be for the benefit of the wife, husband, parent and children of the person whose death shall have been caused." Pol-

McDonald v. Pittsburgh, Cincinnati, Chicago & St. Louis R'y Co.

lock, C. B., said: "But beyond all doubt in the construction of the act of parliament the word 'child' means legitimate child only." This case is cited and approved in *Gibson v. Midland R. W. Co.*, *supra*.

Marshall v. Wabash R. R. Co., *supra*, was an action brought to recover damages for the death of another under section 4425, R. S. 1889, of Missouri. That part of the statute providing who should sue and recover when the deceased was a minor was as follows: "Third, if such deceased be a minor and unmarried, whether such deceased unmarried minor be a natural born or adopted child * * * then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment, or if either of them be dead, then by the survivor." The court held that the father of an illegitimate child did not come within the meaning of the act and could not maintain such action.

In *Harkins v. Philadelphia, etc., R. R. Co.*, *supra*, it was held under the statute of Pennsylvania, which enacts "that the persons entitled to recover damages for any injury causing death shall be the husband, widow, children or parents of the deceased and no other relative," did not give any one the right to recover damages for the death of an illegitimate child, the court said "that the words husband, widow, children, parents of the deceased and no other relative" had in view the family relation as constituted and recognized by the law, and that it was not intended to extend the benefits of the act to persons not falling within the legal definition of the enumerated relationships."

We think it clear, both upon principle and the authorities cited, that the father of an illegitimate child cannot recover damages for the death of such child under the provisions of section 266 (269), *supra*.

The court did not err, therefore, in overruling ap-

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pellant's demurrer to the answer or in sustaining ap-
pellee's demurrer to the reply.

Judgment affirmed.

Filed April 2, 1896.

No. 16,874.

BLOUGH ET AL. v. PARRY ET AL.

WITNESS.—Impeachment by Statements Made Out of Court.—The right to impeach a witness by statements made out of court lies only where such statements are contrary to the testimony of the witness in court relative to material matter in issue.

SAME.—Impeachment.—Negative Answer.—Cross-Examination.—If a party recall a witness ostensibly for the purpose of further cross-examining him, and puts a question not proper in cross-examination, but eliciting evidence in chief, for the purpose of proving such fact she was such party's witness, and upon giving a negative answer such party has no right to impeach the witness by statements made out of court, as the testimony of the witness, though not beneficial, is not prejudicial.

SAME.—Testamentary Capacity.—Cross-Examination.—Where a witness has testified to the testator's mental unsoundness and to testator's specific acts towards him, the witness may be cross-examined in explanation of such acts and treatment by the testator.

INSTRUCTIONS TO JURY.—Will.—Undue Influence.—Instruction not Based on Evidence Given—It is error for the court to instruct the jury as to undue influence in an action contesting the validity of a will, where there was no evidence as to undue influence, and where it does not appear from the record that the instruction was harmless and not misleading.

SAME.—Testamentary Capacity.—Unsoundness of Mind.—Instructions which inform the jury that if the testator was a person of unsound mind, even though such unsoundness was so slight that it did not impair his capacity to make an intelligent testamentary disposition of his property, the will was void, are erroneous and harmful.

SAME.—Unsoundness of Mind.—Testamentary Capacity.—An instruction as to unsoundness of mind, in an action testing the valid-

144	463
148	467
145	109
145	657
147	55
147	700

144	463
148	99
150	161
150	164
150	165
150	276
152	331

144	463
154	672

144	463
160	326
144	463
162	364

144	463
165	96

144	463
169	156

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ity of a will, which charges that if the evidence shows that the testator did not possess mind enough to know the extent and value of his property, the persons who were the natural objects of his bounty and their deserts, and that he had not sufficient memory to retain all these facts long enough to have his will prepared and executed, then he was of unsound mind and the jury should find for plaintiff, is insufficient in not fixing the time of such mental unsoundness at the time of executing the will.

SAME.—*Sanity.—Presumption.—Will.*—In an action testing the validity of a will on the ground of mental unsoundness, an instruction offered to the effect that “every person is presumed to be of sound mind until the contrary is shown,” is correct and should have been given; and an instruction “that the burden is on the plaintiffs to show by a fair preponderance, unsoundness of mind,” does not cure the error, for the instruction as to burden of proof does not raise a presumption as to sanity in favor of the testator.

SAME.—*When Misleading.—Expert Testimony.—Hypothetical Question.*—An instruction that the value of expert testimony depends on the degree of harmony between the facts stated in the hypothetical questions and those established by the evidence, and upon the skill and capacity of the experts, is misleading where it does not refer to their conduct and actions on the stand, the materiality of the facts assumed, their partiality or impartiality, and other relevant circumstances.

WILLS.—*“Unsoundness of Mind,” Meaning Of.—Statute Construed.—Instructions.*—The expression “of unsound mind,” as used in the Indiana statute of wills, means such a degree of unsoundness of mind as incapacitates one from making a will according to the standard fixed by the adjudicated cases for testamentary capacity. (For instructions as to “unsoundness of mind,” see opinion.)

EVIDENCE.—*Burden of Proof.—Will, Testamentary Capacity.*—Plaintiff in an action to set aside a will on the ground of the testamentary incapacity of the testator has the burden of proving such incapacity.

APPELLATE PROCEDURE.—*Rehearing.*—A question cannot first be presented on a petition for rehearing.

From the Elkhart Circuit Court.

Drake & Merritt and A. Ellison, for appellants.

R. Lowry, J. E. McClaskey and J. W. Hanan, for appellees.

MCCABE, C. J.—The appellees brought suit in the

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Lagrange Circuit Court against the appellants to contest the will of one Noah Blough. Proper issues having been formed upon the complaint the venue of the cause was changed to the Elkhart Circuit Court, where a trial by jury resulted in a verdict and judgment in favor of the appellees, setting aside said will, over appellants' motion for a new trial. The only error assigned here is on the action of the circuit court in overruling appellants' motion for a new trial. The grounds of contest alleged in the complaint were unsoundness of mind of the testator and undue influence exerted over him by the appellants.

A great number of causes are assigned therefor in the motion for a new trial, some of which we will notice. One Emma Norris was called and testified as a witness on behalf of the appellants. The wife of the testator had been dead some years, and Miss Norris had been the sole housekeeper of the testator for several years since the death of his wife, up to and during the time when the will was made. She had testified to many acts, conversations and conduct of the testator during that time, and upon such facts had stated her opinion that the testator was of sound mind. She had also testified that during that time he was able to get into or out of a buggy alone and hitch up his horses, and that appellant, Valentine, was always kind and filial toward his father.

Some days after she had thus testified on behalf of appellants the appellees recalled her, as they claimed, for further cross-examination, whereupon they propounded to her the following question: * * "While you were working for Mr. Noah Blough, did not Valentine Blough come there one day and tell his father that he wanted him to go to Ellison's bank, that he had some important business to transact, * * and

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was not his father at that time sick and in his bed, and * * did not his father say to him: 'I am not well enough to go and don't want to go,' that Valentine said 'Pap, it is important business and you must go,' and did he not take him out of bed, put his clothes on and put him into the buggy and drive off with him, * and did he not return with his father on the same day and help him out of the buggy at the gate, and did his father * not crawl in on his hands and knees to the house and lie down upon the floor and cry bitterly and state that Valentine had taken him up to Ellison's bank and had him sign some papers, that he didn't know what they were, but supposed it was a will?"

Over appellants' objection that the question was not proper cross-examination, the witness was permitted to answer that she knew nothing of such happening.

Appellees then propounded to her, to lay the foundation to impeach her, the following question:

"Did you not have a conversation with Charles Parry and William Blough, at Noah Blough's house, in the month of March, 1887, and did you not then and there state to them that some days before that Valentine Blough had come to his father's house, and his father was sick and in bed, and told him that he wanted him to go with him to Ellison's bank, that he had some important business to transact; that his father said he was not well enough to go and did not want to go, that Valentine said 'Pap, it is important business and you must go,' that Valentine got his father out of bed, put his clothes on for him, took him out of the house and put him in the buggy and drove off toward Lagrange; that later in the day Valentine came back with his father, helped him out of the buggy and drove off; that his father crept into the

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house on his hands and knees and laid down on the floor and cried bitterly and said that Valentine had taken him up to Ellison's bank and caused him to execute some papers; that he did not know what they were, but supposed it was a will?"

Over appellants' objection that the question was not proper cross-examination, she not having been examined on that subject in chief, and that the question was not proper for the sole purpose of impeachment, the witness was allowed to answer that she had no recollection of ever talking with them at that time, or any other time.

The appellees then called said Charles Parry and William Blough and asked them if the witness, Emma Norris, had not made the statements attributed to her in the question at the time and place indicated therein, and they each answered that she had, over appellants' objection that the answers were not sufficient ground for impeaching the witness, and that it was not competent to prove undue influence by impeachment.

We think the court erred in permitting these questions to be answered.

The witness, Emma Norris, had, it is true, testified to many facts tending to establish the soundness of the testator's mind; but she had not testified to anything tending to negative the charge of undue influence in the procurement of the will, especially had she given no testimony on that branch of the case that was even inconsistent with her alleged statement to these two witnesses. One of the recognized methods of impeaching a witness is to prove that he has made statements out of court inconsistent with his evidence in court. It is not every statement made out of court by a witness that affords a ground of impeaching him. It is only such statements made out of court contrary

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to the testimony of the witness in court, where such testimony relates to a material matter in issue. *Par-ton v. Dye*, 26 Ind. 393; *Seller v. Jenkins*, 97 Ind. 430; *Horne v. Williams*, 12 Ind. 324; *Fogleman v. State*, 32 Ind. 145. But there must be contradiction between the statements alleged to have been made out of court and those made on the witness stand to afford a ground of impeachment by proving the statements made out of court. *Seller v. Jenkins, supra*. There was no such contradiction in this case. Therefore, there was no right to ask the question of the witness, Emma Norris, by the appellees for the mere purpose of laying the foundation for impeaching her. Conceding, without deciding that appellees did have the right to prove by her, or any other witness, the facts detailed in her alleged statement out of court to the two witnesses named at the proper time, because the other evidence discloses that on the day named in that statement the will was made in Ellison's bank in the town of Lagrange, and that the statement, if true, would tend to prove one of the grounds specified in the complaint for setting aside the will, namely, undue influence exerted over the testator by Valentine and other appellants; but when appellants asked Miss Norris whether those facts as detailed in the alleged statement occurred, and she answered in the negative, that was the end of their rights in that direction. For the purpose of proving the facts mentioned she was the appellees' witness. And though the statute authorizes a party in some instances to impeach his own witness, it has been held by this court, and, we think, correctly so, that such right only arises when the witness testifies to some matter prejudicial to the party calling him. Burns R. S. 1894, section 516 (R. S. 1881, section 508). In *Hull v. State, ex rel.*, 93 Ind. 128, at page 133, this court said: "Where a witness does not

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testify to anything prejudicial to the party calling him, there can be no object in impeaching him, and hence the statute cannot apply to such case. Nor can it apply to a case where a witness fails to testify to such facts as he is called to prove. Such testimony, though not beneficial, is not prejudicial, and, therefore, no reason exists for impeaching the witness." The witness, Emma Norris, did not testify to the facts sought to be proven by her, and therefore no right arises to impeach her for her failure to testify to such facts.

This alleged impeaching testimony, under the circumstances, probably had a prejudicial influence on the jury. The evidence in support of the charge of unsoundness of mind was sharply conflicting, and as it comes to us we cannot say that it was of such a character that the jury must have based their verdict on the conclusion that the preponderance thereof was with the appellees on the charge of unsoundness of mind of the testator when he executed the will, and therefore we cannot say that they did not base their verdict on the charge in the complaint of undue influence exerted by the appellees. We have been unable to find any evidence in the record tending to support the charge of undue influence, aside from the alleged impeaching testimony already mentioned.

The court, of its own motion, gave seven long instructions on the subject of undue influence. One of them, the 10th, reads as follows: "10. The amount of undue influence which is sufficient to invalidate the will varies, of course, with the strength or weakness of the mind of the testator. The influence which would subdue and control a mind naturally weak, or one which had become impaired by age, disease, physical injury, family troubles and perplexity, or other causes, might have no effect to over-

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come or mislead one naturally strong and unimpaired. The influence that will avoid or vitiate the will of a testator whose mind is thus weak and enfeebled need only be such as would, and did, cooperate with such weakness and feebleness of mind to the extent of supplanting the free agency of the testator and induce him to do that which he would not have done in the absence of such undue influence, by reason of his being unable to refuse what was thus desired of him, or too weak to resist the influence in question. Hence, if you believe, from the evidence in this case, that the mind of the testator, Noah Blough, at and before the time of the making of the will, had become thus weak and enfeebled, and that, by the degree of influence herein described, he was induced to make the will in controversy when he would not otherwise have made any will at all, or that he was induced thereby to make his will different from what he otherwise would have done, you should, in such case, find for the plaintiffs."

As before observed, there being no evidence of undue influence it was error to give the above instruction. It has been generally held by this court to be erroneous to give instructions to the jury not applicable to the case proven by the evidence. *Hill v. Newman*, 47 Ind. 187; *McMahon v. Flanders*, 64 Ind. 334; *Moore v. State*, 65 Ind. 382; *Nicklaus v. Burns*, 75 Ind. 93; *Summerlot v. Hamilton*, 121 Ind. 87.

There may be cases where such instructions may appear, from the record, to have been harmless. But it does not so appear in this case. In *Nicklaus v. Burns, supra*, this court said: "After the evidence has been heard and argument of counsel had, for the court to instruct the jury upon a state of facts not embraced in the evidence, nor discussed by counsel, is asking them to decide questions which have not been

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submitted to them for trial. Jurors are liable enough to consider matters outside of the evidence, without being led off in that direction by instructions from the court. Such practice is well calculated to confuse and mislead the jury." And in *Hays v. Hynds*, 28 Ind. 531, at page 537, this court said: "Instructions should be pertinent to the case. Juries are apt to assume, and are justified in assuming, that they are applicable. This could only be so upon the ground that Alexander acting as a pork-dealer was doing business for the bank, and unless the jury utterly disregarded the instructions, it could scarcely fail to mislead them." To the same effect is *McMahon v. Flanders*, *supra*. Here the only evidence that tended to establish undue influence was the evidence erroneously admitted to impeach the witness, Miss Norris. The instruction above quoted was immediately followed up with six more long instructions touching the subject of undue influence. If ever there was a case where the instructions were calculated to impress the jury that there was legitimate evidence before them upon a given point, when in fact none had been introduced, this was such a case. It is difficult to see how the jury escaped being led by the instructions to conclude that the evidence of the alleged statement of Miss Norris was legitimate evidence of undue influence exerted by Valentine Blough on the testator to make the will contrary to his wishes. The admission of that evidence was reversible error regardless of the seven instructions on the subject of undue influence; and it was error to give the seven instructions on the subject of undue influence regardless of the question whether they were correct statements of law in the abstract, and regardless of the erroneous admission of the evidence mentioned.

But when these two errors are combined they con-

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stitute more seriously prejudicial and controlling error. The prejudicial character of these two errors combined is intensified by the fact that the trial court nowhere in its instructions informed the jury that they could not consider the alleged impeaching evidence to prove the exercise of undue influence over the testator. The seven instructions on that subject implied that they could.

Moreover, the appellants requested the court, at the proper time, to instruct the jury that they could not consider that evidence for that purpose, but the court, as the bill of exceptions informs us, refused to give such instruction.

The 7th instruction, after alluding to the expert testimony of witnesses belonging to the medical profession in the case, says: "In weighing such testimony it will be proper for you to consider the degree of learning and skill possessed by such witnesses, their capacity to determine, as experts in that branch of knowledge, the probable or actual condition of the testator's mind from the facts submitted, and the degree of harmony there maybe, or the opposite, between the facts stated in the hypothetical questions and those established by the evidence. In proportion to the degree of such harmony between the facts embraced in the hypothetical questions and those established by the evidence, and the skill and capacity of these experts, judging by the law of mind, to deduce therefrom just conclusions, will be the value and force of such testimony, and in view of all the facts presented to you by the evidence on those points, you will consider and determine what weight and effect you should give to such testimony. If you believe from such evidence, when considered in connection with all the other proofs in the case, that during the period of time in which the will of the testator was executed

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he was of unsound mind, then it will be your duty in like manner to find for the plaintiffs."

The latter part of this instruction relating to unsoundness of mind we will consider in connection with the next, the 8th instruction.

But the forepart of the 7th instruction was calculated to mislead the jury. It laid down too narrow and too inflexible a rule for estimating the weight to be given to the testimony of an expert, and limited too closely the various matters which the jury were entitled to consider in weighing such testimony. It gave too much prominence to the mere skill of the expert, leaving out of view his credibility, as exhibited by his conduct and bearing on the witness stand, and invaded the province of the jury in attempting to set too narrow limits to their exclusive province of judging of the value and force of such testimony. *Cunéo v. Bessoni*, 63 Ind. 524; *Eggers v. Eggers*, 57 Ind. 461; *Durham v. Smith*, 120 Ind. 463, at page 468.

The 8th instruction is as follows:

"It is not necessary, in order to avoid the will in question in this suit, that the mental unsoundness of Noah Blough, the testator, if it is shown to have existed, should have actually entered into or affected the will or caused its execution. It will be sufficient to avoid the will if the evidence shows to your satisfaction that at the time it was executed, the testator, Noah Blough, was a person of unsound mind, as the laws of this State do not permit a person of unsound mind to execute a will."

The latter part of the 7th instruction, the 2d, 12th and the 13th instructions declare the same proposition of law as that embodied in the 8th, above quoted; and they all and each of them state the proposition as unqualified as the 8th does, that is, that a person of unsound mind cannot make a valid will.

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These instructions, by numerous repetitions of the proposition, in effect told the jury that if the testator was a person of unsound mind, even though such unsoundness was so slight that it did not impair his capacity to make an intelligent testamentary disposition of his property, or, in other words, that though the unsoundness was so slight that it had no influence or effect either in the production of the will or in the disposition of property therein provided for, the will would nevertheless be void. Notwithstanding the statute provides that "all persons, except infants and persons of unsound mind may make a will," it has been the construction uniformly given thereto by this court for a long time that, "In legal contemplation, one who has sufficient mind to know and understand the business in which he is engaged, who has sufficient capacity to enable him to know and understand the extent of his estate, the persons who would naturally be supposed to be the objects of his bounty, and who could keep these in his mind long enough to, and could, form a rational judgment in relation to them, is a person of sound mind. If he has not mental capacity to this extent, he would not be a person of sufficient disposing mind." *Lowder v. Lowder*, 58 Ind. 538. In *Durham v. Smith*, *supra*, the following instruction came in question: "6. Furthermore, I instruct you that a person who is of unsound mind is incapable of making a valid will, and if there is unsoundness of mind, it is not necessary for the contestant to show that such unsoundness had anything to do with the manner of disposing of the property. In such a case the will is invalid, whether it is shown that the unsoundness of mind had, or had not, affected the character of the testament." This court said: "By adding the words 'in such a case the will is invalid, whether it is shown that the unsoundness had or had

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not affected the character of the testament,' it changed the scope and meaning of the instruction, and was, in effect, telling the jury that, upon considering all the evidence, if they came to the conclusion there was any unsoundness of mind, or defect of any character in the mind of the testatrix, no difference to what extent such defect affected or impaired the mind, or whether it in any way affected the disposition of the property devised or the making of the will, the will would be invalid; and this, too, even though the evidence might affirmatively establish the fact that such defect in no way entered into the making of the will or disposition of the property, and that she had at the time sufficient mental capacity to make a valid will. In short, this charge recognizes but two conditions of the human mind, one sound and capable of doing all acts, and the other unsound and incapable of doing any act; that a person is responsible for all his acts, or not responsible for any of his acts. This is an erroneous theory of the law. *Trumbull v. Gibbons*, 51 Am. Dec. 253; *Clark v. Fisher*, 19 Am. Dec. 402; *Jackson v. King*, 15 Am. Dec. 354, and note 363. * * * It is evident that a person might be possessed of the requisite capacity to make a will, as held in *Louder v. Louder*, *supra*, and yet have some defect of the mind, some delusion in relation to some subject entirely foreign to the execution of the will, the disposition of the property, the devisees, or those who are the natural objects of his bounty. It is not necessary that we point out in this opinion what particular defects or delusions there may be in a testator's mind, and yet he possess sufficient mental capacity to make a valid will; it is sufficient if there may be any to render the instruction under consideration erroneous. * * * We think

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the instruction clearly erroneous, and ought not to have been given."

In *Burkhart v. Gladdish*, 123 Ind. 337 (343), Coffey, J., speaking for the court, said: "It is not to be denied that a person may be possessed of delusions and yet be capable of making a valid will." This court, in that case, overruled, and we think correctly. *Eggers v. Eggers*, *supra*, in effect on the point in question.

In the recent case of *Wallis v. Luhring*, 134 Ind. 447, at pages 449 and 450, this court said: "The court very properly avoided confusing the minds of the jury on this point, and instead detailed very fully the various forms of disease, all included under the terms 'unsoundness of mind.' * * * Names are not of so much consequence as things, and it was more important that the jury should understand the character and degree of mental infirmity which would incapacitate a person from making a will, than to know whether the disease should be called insanity, unsoundness of mind, imbecility, or by some other name."

It is, however, not denied by appellees' learned counsel that the 8th instruction standing alone would be error. But they contend that under the authority of *Durham v. Smith*, *supra*, and *Burkhart v. Gladdish*, *supra*, the instruction is so modified and explained by two accompanying instructions as to make it harmless, if not technically correct. Those instructions are numbered 2 and 3. No. 2 reads thus: "Under the laws of this State, a person of unsound mind cannot make a will, and a person of unsound mind means an idiot, *non compos*, lunatic, monomaniac, or distracted person."

This explanation is no clearer or plainer than the instruction that it is to explain or modify. *Non compos* is defined by Webster as a person of unsound

mind. That is one of the definitions of the word. But if there is any explanation or modification of the 8th instruction in the 2d it is all taken away by the 3d, which reads as follows: "The evidence given on behalf of the plaintiffs tends to show that the testator, at the time of making the will in question, was feeble in body and mind; that he was subject to delusions, and that his memory and reasoning powers were impaired, and that he was of unsound mind. In order that you should find for the plaintiffs, it is not necessary for the evidence to show that the testator was a maniac or madman, or crazy, as that word is popularly used, nor that he was a fit subject for a lunatic asylum; but if the evidence shows that he did not possess mind enough to know the extent and value of his property, the number and names of the persons who were the natural objects of his bounty, their deserts with reference to their conduct generally, and treatment of him, their capacity and necessity; or that he did not have sufficient memory to retain all these facts long enough to have his will prepared and executed, then he was of unsound mind, and you will find for the plaintiffs."

Had this instruction told the jury that if the testator had and was possessed of the measure and degree of mental capacity therein described when he made the will, he was of sound mind, there would be some ground for the contention that the 8th instruction was modified or explained thereby so as to render it harmless, if not technically correct. But it did not do so. On the contrary, it simply told the jury that if he did not have and possess that measure and degree of mental capacity he was of unsound mind. That in no way modifies or explains the statement that if he was of unsound mind when the will was made it is void. That is in no way inconsistent with or a modi-

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fication of the idea couched in the 8th instruction, that if the testator was of unsound mind when the will was made, however slight or small the degree, the will was void. It only differed from the 8th instruction in that it told the jury that in the absence of a certain degree or measure of mental capacity the testator would be of unsound mind. Had it told the jury that if the testator had that degree of mental capacity when he made the will, then he was of sound mind, a very different question would be presented. There would then have been some ground for the contention that the 3d instruction explained what was meant in the 8th instruction by the phrase "unsound mind." The 2d and 3d instructions did not explain or modify the 8th and other instructions, announcing the same legal proposition, or cure the error therein. We, therefore, hold that it was error to give each one of said instructions.

The 3d instruction asked by the appellants and refused by the court was erroneously refused. It reads thus: "Every person is presumed to be of sound mind until the contrary is shown." This instruction correctly stated the law and ought to have been given. *Greenley v. State*, 60 Ind. 141; *Guetig v. State*, 66 Ind. 94.

Appellees' learned counsel concede that the instruction ought to have been given, and that its refusal was probably an oversight on the part of the court. They, however, contend that the error was cured by an instruction "that the burden is on the plaintiffs to show by a fair preponderance unsoundness of mind." They contend that the above statement embodies the idea that the law presumed sanity. That position cannot be maintained. In many civil cases the burden of proof rests upon the plaintiff. In such cases it is correct to instruct the jury that before the plaintiff can

recover he must prove his cause of action by a fair preponderance of the evidence. And yet, according to appellees' contention, that is tantamount to telling the jury, and that the court may tell the jury, that the presumption is in favor of the defendant, that the plaintiff has no cause of action against him. That is not the law. That a preponderance of the evidence must be adduced by the party having the burden of proof to justify a recovery by him does not mean that a presumption arises in favor of the adverse party that no cause of action exists. In such a case there is no presumption either way. The court erred in refusing the instruction, and the error was not cured by the instructions given. There are other errors in the instructions, but they are such as may not be committed on another trial, and, therefore, we will not extend this opinion by passing upon them.

The witness Pearson testified in chief on behalf of appellees to having lived with and worked for the testator for a period of about three years, commencing in 1879 and ending in 1883; that he had then gone west and remained in Wyoming for about three years, coming back in 1886; that during the fall and winter of 1886-7 he visited the testator's house frequently, and that testator could not recognize him or be made to understand that he ever had known the witness. The witness detailed many facts tending to show that the testator was a physical and mental wreck and was of unsound mind. On cross-examination, in answer to proper questions, the appellants offered to prove by the witness that the visits of the witness to the house of the testator at the time mentioned by him were ostensibly as a suitor for the hand of Miss Norris, the testator's housekeeper, and that testator was trying to guard Miss Norris against the addresses of the witness, and that the witness knew it; that during those

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visits the witness for some time was trying to borrow money of Miss Norris, the old man knew it and was advising her against lending him the money, and that was the reason why the old man treated the witness as he did at his house, and the reason why he did not want him there, and the witness knew it, and that the witness did finally, during said visits, succeed in getting \$500 of the girl under a promise of marriage, and has never paid it back.

The court sustained appellees' objection to these questions and the proposed proof.

In defense of this ruling appellees' learned counsel have only to say: "But to go into the merits or demerits of said Pearson's conduct toward said Emma Norris, we insist, was entirely outside of the issues in the case."

Evidently counsel treat the proposed cross-examination as an attempt to impeach the witness. But it is nothing of the kind. A witness may be impeached, as we have already seen above, by proving statements made out of court inconsistent with his evidence in court, but the point of contradiction must be material to the issue. And so, too, a witness may be impeached by proving his general moral character to be bad, but not by proving particular acts of good or bad conduct. *Long v. Morrison*, 14 Ind. 595; *Cunningham v. State, ex rel.*, 65 Ind. 377; *Meyncke v. State, ex rel.*, 68 Ind. 401; *Rawles v. State, ex rel.*, 56 Ind. 433; *Bessette v. State*, 101 Ind. 85; *Spencer v. Robbins*, 106 Ind. 580. But a wider latitude is permissible in cross-examination merely. In *Wachstetter v. State*, 99 Ind. 290, at page 296, it was said: "In other words, counsel imply, if they do not assert, that there is no proper or legal connection between a man's reputation for truth and veracity and his reputation for integrity or honesty; that, while he may have the reputation of being a

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thief and a highwayman, his reputation for truth and veracity may still be good. * * Truth or veracity is a trait of the man of integrity or honesty; it is never a trait of the thief or robber. * * * * When Stap and Wilson had testified that the reputation of Lee for truth and veracity was good, it was competent to show, upon cross-examination, that Lee had been repeatedly under arrest or in the station house on a charge of felony."

In *Bessette v. State, ex rel., supra*, this court said: "It is proper within the bounds of propriety, to be controlled by the trial court, that the character and antecedents of a witness may be subjected to a test on cross-examination, and that questions which go to exhibit his motives and interest as a witness, as well as those tending to show his character and antecedents, should be allowed." In *Spencer v. Robbins, supra*, it was said: "The rule is well settled that specific acts of immorality cannot be proved for the purpose of impeaching the moral character of a witness. It may be proper, however, under extraordinary circumstances, to ask questions of a witness on cross-examination for the purpose of showing his character and antecedents. *Bessette v. State, ex rel., supra; City of South Bend v. Hardy*, 98 Ind. 577 (49 Am. Rep. 792). This is a matter, however, within the sound discretion of the *nisi prius* court, to be exercised in each case as necessity may seem to require. In order to justify a reversal there must have been a clear abuse." In *City of South Bend v. Hardy, supra*, this court said: "If the cross-examination tends merely to disgrace the witness, but relates to a collateral and independent fact, and goes clearly to the credit of the witness, whether in such case he has the privilege to decline or not, the matter so far rests in the discretion of the

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trial court that in the absence of the claim of privilege, if the question relate to a matter of recent date and would materially assist the jury or the court in forming an opinion as to his credibility, the court will usually require an answer, over the objection of counsel, but may sustain an objection." So far as these questions went to explain the reason why the testator acted and treated the witness as he did it was proper cross-examination, and it was reversible error to sustain the objection; but as to such questions as related to his previous character and antecedents the result of our decisions is that this matter rested in the sound discretion of the trial court, and unless we can say that there was a clear abuse of that discretion the ruling is not reversible error. We are unable to say that the court abused its discretion as respects those questions.

We are of opinion that the circuit court erred in overruling the motion for a new trial. The judgment is reversed and the cause remanded, with directions to sustain the appellants' motion for a new trial.

Filed March 19, 1895.

ON PETITION FOR REHEARING.

MCCABE, J.—The earnestness, ingenuity and learning with which the petition for rehearing in this case is pressed, and the growing importance of the subject, have induced us most carefully to review the voluminous record of over 1,000 printed pages, and also to consider and investigate very closely the legal principles by which courts should be guided in determining questions of testamentary capacity as affected by mental unsoundness.

In opposing our holding that the trial court erred in giving a series of instructions on the subject of undue influence, regardless of their correctness as ab-

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abstract propositions of law, because there was no evidence on that subject, counsel do not deny the correctness of the holding in the abstract, nor that it was error in the trial court to so instruct, but put their reliance upon the proposition that such error was not available to appellants, because they asked the court to give five instructions on the same subject. It might be sufficient answer to this contention that no such defense of that action of the trial court was made in appellees' original briefs on the hearing of this case, and no such question for decision was presented originally, and that the point is made now for the first time.

There was nothing said in the original briefs or argument about appellants being precluded or estopped by inviting the error in asking instructions on the same subject. It is too late to raise a point or present a question for the first time on a petition for a rehearing. But there is no merit in the point any way, because it does not appear from the record that appellants are the parties that invited the error.

The authority cited in support of the point is Elliott App. Proced., section 625-630. It is said in the latter section that: "The rule that a party cannot successfully assail a decision given upon his express or implied invitation is really nothing more than an application of the general principle that parties will be held to the theories they present and upon which they secure action by the court."

The rule as stated in *Pence v. Waugh*, 135 Ind. 143, at page 150, is: "If a party opens the door for the admission of incompetent evidence he is in no plight to complain that his adversary followed through the door thus opened." *Perkins v. Hayward*, 124 Ind. 445. The rule as stated in *Louisville, etc., R. W. Co. v. Miller*, 141

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Ind. 533, at page 563, is "that a party cannot successfully complain of error he invites."

The record does not show that appellants were the parties that invited and led the court into an erroneous line of conduct. On the contrary, it appears that the court acted on appellees' invitation into error, and did not act on appellants'.

Another point urged upon our consideration which we deem worthy of notice, is the holding in the original opinion that the forepart of the 7th instruction given by the court was erroneous, is seriously complained of because it is not pointed out in the opinion that there is anything analogous in the instructions passed on in the cases cited, to that contained in the one in hand.

It ought to be sufficient to say in response to this criticism that the language of the opinion is taken largely from one of those cases. One sentence in that instruction ought to condemn it if there was no other objection to it, relating as it does to the weight of expert testimony; that sentence reads thus: "In proportion to the degree of such harmony between the facts embraced in the hypothetical questions and those embraced by the evidence, and the skill and capacity of these experts judging by the law of mind, to deduce therefrom just conclusions, will be the value and force of such testimony."

It does seem that one who is so good a master of English as the learned counsel of appellee need not to be told that the language quoted makes the value and force of the expert testimony depend entirely upon the degree of harmony between the facts embraced in the hypothetical questions and those established by the evidence.

There is no other part of that instruction that qualified it in this respect.

That is, if there was perfect harmony between the

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facts assumed in the hypothetical questions and those proven by the evidence, then the instruction, if it meant anything, meant such expert testimony was at least of great value and force regardless of the conduct and actions of such witnesses on the stand, the materiality of the facts assumed, the partiality or impartiality of such witnesses, and many other circumstances that the jury had a right to, and which it was their duty to take into consideration in weighing the testimony of such witnesses. It is true that if the facts assumed in the hypothetical questions are not substantially proven by the other evidence, the expert testimony thus elicited will be of little or no value. But it does not follow, on the other hand, that such expert testimony is entitled to full credence and belief or deemed of great value simply because the facts assumed in the hypothetical questions to the expert witnesses were fully proven by the other evidence. But such was the force and effect of the instruction. In *Goodwin v. State*, 96 Ind. 550, at page 569, it was held upon this subject that: "It is proper for the court to direct the minds of the jury to the facts of the case, but it is not proper for it to annex weight and value to them; that is the exclusive province of the jury." To the same effect is *Garfield v. State*, 74 Ind. 60.

The credibility of expert witnesses and the weight of their testimony are as much subject to the scrutiny and determination of the jury as that of any other class of witnesses that may come before them.

But the most serious objection urged against our original opinion relates to our holding on the instructions touching unsoundness of mind.

Counsel quote portions of the instructions other than the 8th, quoted by us in the original opinion, and repeating the same proposition contained in the 8th in different language, namely, as in the 7th, and which

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we here reproduce from their brief thus: "If you believe from such evidence, when considered in connection with all the other proofs in the case, that during the period of time in which the will of the testator was executed he was of unsound mind, then it will be your duty, in like manner, to find for the plaintiffs;" as in the 2d, "Under the law of this State, a person of unsound mind cannot make a will, and a person of unsound mind means an idiot, *non compos*, lunatic, monomaniac or distracted person," as in the 12th, "If you are satisfied by a preponderance of the evidence that when he executed the will the testator was of unsound mind you should find for the plaintiffs," and as in the 13th, "you are to say whether or not the testator was of sound mind at the time of the execution of the will. If he were not of sound mind you will, of course, find for the plaintiffs."

The learned counsel say that our version of these instructions that they "in effect told the jury that if the testator was a person of unsound mind, even though such unsoundness was so slight that it had no influence or effect in the production of the will, or in the disposition of property therein provided for, the will would nevertheless be void," is, as they say, a startling interpretation.

No reason is given or argument made why a direction to the jury that "If he [testator] was not of sound mind you will, of course, find for the plaintiffs," does not mean that they are to so find regardless of the degree of mental incapacity and regardless of the fact that such unsoundness did not deprive him of testamentary capacity, or enter into or affect the will or the manner of the disposition of the property therein made. Or why a direction to the jury that if at the time the testator executed the will "he was of unsound mind, then it will be your duty in like manner

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to find for the plaintiffs," does not require them to so find, even though the evidence clearly showed that the unsoundness of mind was of such a character as did not deprive him of testamentary capacity according to the legal standard.

Nor is any reason or argument suggested, nor do we know of any, why the direction in the 8th instruction that: "It will be sufficient to avoid the will * * if * at the time it was executed the testator * * was a person of unsound mind" did not authorize and require the jury to set aside the will on account of such unsoundness, even though its degree did not destroy testamentary capacity or exert any influence on the testator as to the manner of disposing of the property or enter into the execution of the will.

These instructions were unqualified, and the full operation, force and effect of their language could not be cut down and limited by anybody but the court.

If the court had explained in these instructions, as was done in *Lowder v. Lowder*, 58 Ind. 538, and many other cases in this court like it, what was the legal signification of the phrase of unsound mind, then the instructions might have been correct. In the case last named the instruction, after stating that a person of unsound mind cannot make a will, proceeded to explain what was meant in contemplation of law by the phrase of unsound mind, stating that a lack of a certain degree of mental soundness or capacity was in contemplation of law unsoundness of mind. And on the other hand a certain degree of mental soundness or mental capacity was soundness of mind. The learned counsel for appellees finally come to the point and state their own interpretation of the instructions thus: "It is no doubt assumed in each of these instructions that, if the plaintiffs below had shown unsoundness of mind they would be entitled to recover, with-

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out its being further shown that such unsoundness had anything to do with the manner of disposing of the property, or that it 'did,' in other words, affect the character of the instrument. And this, we maintain, has been hitherto the settled law of the State. That the cases of *Willett v. Porter*, 42 Ind. 250, and *Eggers v. Eggers*, 57 Ind. 461, have been, heretofore, either modified or overruled on that particular point we submit with profound deference, is a misapprehension."

Our interpretation does not seem so startling to counsel when they come to state their own interpretation of the instructions in question. The substance of theirs is, that unsoundness of mind avoids the will "without it being further shown that such unsoundness had anything to do with the manner of disposing of the property, or in any manner affected the character of the testament.

That is precisely the interpretation placed on these instructions in the original opinion, and which was so startling to the learned counsel. But counsel are no less mistaken in their assumption as to what the settled law has hitherto been on the point under discussion. That point was not in any manner involved nor decided in *Willett v. Porter*, *supra*, as counsel mistakenly assert, and for that very conclusive reason that case has never been modified or overruled on that particular point, as the learned counsel correctly assert. But the other case, *Eggers v. Eggers*, *supra*, has been modified before our original opinion.

It was held by this court in *Noble v. Enos*, 19 Ind. 72, that all those excepted out of our statute of wills were precluded from making wills, and that necessarily precluded persons of unsound mind. It has, in effect, been held by this court in a long line of cases that the phrase of unsound mind, as used in our statute of wills, means a person of such degree of unsoundness

of mind as incapacitates him from making a will according to the standard fixed by the adjudicated cases for testamentary capacity. *Runkle v. Gates*, 11 Ind. 95; *Rush v. Megee*, 36 Ind. 69 (73); *Lowder v. Lowder*, *supra*; *Turner v. Cook*, 36 Ind. 129 (137); *Moore v. Allen*, 5 Ind. 521; *Herbert v. Berrier*, 81 Ind. 1; *Todd v. Fenton*, 66 Ind. 25; *Burkhart v. Gladish*, 123 Ind. 337; *Bower v. Bower*, 142 Ind. 194; *Wallis v. Luhring*, 134 Ind. 447, and perhaps other cases. That standard as established by the foregoing cases is defined to be "one who has sufficient mind to know and understand the business in which he is engaged, who has sufficient mental capacity to enable him to know and understand the extent of his estate, the persons who would naturally be supposed to be the objects of his bounty, and who could keep these in his mind long enough to, and could, form a rational judgment in relation to them," has testamentary capacity. That has been substantially the standard for testamentary capacity from the days of Lord Coke down to the present time. See the cases last above cited. 25 Am. and Eng. Ency. of Law, 970-973, and authorities there cited; *Marquis of Winchester's case*, 6 Coke R. 23; 1 Redf. Wills, and authorities there cited.

The meaning thus assigned to the phrase of unsound mind by this court in construing our statute of wills was fully justified and founded in good reason. Because, according to Winslow, the phrase of unsound mind was first used by Lord Eldon to designate a state of mind not exactly idiotic, and not lunatic with delusions, but a condition of intellect between the two extremes, and unfitting the person for the government of himself and affairs. Taylor Med. Jur. by Clarke Bell, 678. To the same effect is *Den v. Johnson*, 2 Southard (N. J.) 455, s. c. 8 Am. Dec. 610.

Thus we find the phrase of unsound mind had at-

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tained an appropriate and technical meaning in the law, conveying the idea of testamentary capacity according to the legal standard for such capacity.

Another statute in force at the time prescribing the rule for construing statutes provides that: "Words and phrases shall be taken in their plain, ordinary or usual sense. But technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." R. S. 1894, section 240 (R. S. 1881, section 240).

To construe the statute so as to give the phrase of unsound mind its plain, or ordinary, or usual sense, as was done in the Eggers case, would bring its provisions into conflict. The word unsound controls the meaning of the whole phrase. And the plain, ordinary and usual sense of the word unsound, as defined by Webster, is: "Not sound; not whole; not solid; defective, infirm, diseased." The same meaning we have given the words as used in the wills statute was in effect given to them by this court in construing the criminal code of 1852, providing that if any person of sound mind shall do the things therein specified should be deemed guilty of murder in the first degree. *Stevens v. State*, 31 Ind. 485; *Herbert v. Berrier*, *supra*.

The statute of wills authorizes a contest on the simple "allegation of the unsoundness of mind of the testator." R. S. 1894, section 2766 (R. S. 1881, section 2596). *Lange v. Dammier*, 119 Ind. 567; *Etter v. Armstrong*, 46 Ind. 197. Now if the phrase "of unsound mind," as used in the statute and authorized by the same statute to be used in a complaint to contest a will for mental unsoundness means testamentary incapacity, as we have shown it does, what is the issue tendered by such a complaint? Unquestionably it must be testamentary incapacity, which incapacity is

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charged in the complaint by virtue of the allegation of "unsoundness of mind."

To determine, therefore, whether the instructions in question were right we have only to determine on whom rests the burden of that issue. Appellants' counsel go into a lengthy discussion of that question, but it has been uniformly held by this court, in a long line of cases, that it rests on the plaintiff, and in most of the cases the reason upon which the rule is rested is that testamentary capacity is presumed. *Moore v. Allen, supra*; *Rush v. Megee, supra*; *Turner v. Cook, supra*; *Herbert v. Berrier, supra*; *Dyer v. Dyer*, 87 Ind. 13; *Hite v. Sims*, 94 Ind. 333; *Burkhart v. Gladish, supra*; *Wallace v. Luhring, supra*; *Pence v. Waugh, supra*. It is true outside of this State there is a conflict in the decisions upon this question, but the overwhelming weight of authority elsewhere is in accord with our decisions, this conflict having its origin in a rule of probate practice requiring the executor to offer some evidence of the testator's sanity on propounding the will, and to examine the subscribing witnesses on that point, whether his capacity was or was not impeached on that point. 25 Am. and Eng. Ency. of Law, 996-999, and authorities there cited. The meaning of the complaint charging unsoundness of mind being a charge of testamentary incapacity under the statute, and the burden of that charge being on the plaintiff, it follows, as an unavoidable conclusion that the plaintiff cannot stop short of proof of the testamentary incapacity he has alleged, and demand a verdict. The failure of the defendant to go forward and disprove the allegations of the complaint left unproven by the plaintiff cannot entitle the plaintiff to a verdict unless testamentary incapacity is presumed, and that, we have seen, is not presumed, but the direct contrary is presumed. But it may be asked

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and the holding is that it is *prima facie* evidence of testamentary incapacity prior to the execution of the will. *Prima facie* evidence means, says Webster, "evidence which is sufficient to establish the fact unless rebutted." That puts the case exactly in line with the Alabama case. Both of these cases are in harmony with the uniform current of authority everywhere. 1 Redf. Wills, 48, 113 and 114, and authorities there cited; Wharton & Stile Med. Jur. sections 62 and 63, and authorities there cited; 25 Am. and Eng. Ency. of Law, 978-979, and authorities there cited. The case of *Kentworthy v. Williams*, 5 Ind. 375, is overruled in so far as it conflicts with this decision as to the burden of proof. The dictum in seeming conflict with this opinion in *Durham v. Smith*, 120 Ind. 463, in the lower half of page 465, is disapproved.

Counsel now for the first time urge that instructions 5 and 17, given by the court, if construed along with the faulty instructions above, would have so qualified them as to make the whole correct or cure any error in them. It is too late to present a question for decision for the first time in a petition for a rehearing.

No such question was presented on the original hearing and, therefore, cannot, under the well settled practice in this court, be considered or decided now. The other grounds urged relate to minor points in our original decision and consist only of a re-argument of the points then decided. The argument has not convinced us that our decision of any of them was wrong.

Petition overruled.

HOWARD, J., dissents. •

Filed April 3, 1896.

The Corporation of the Town of Troy v. Eble et al.

No. 17,378.

THE CORPORATION OF THE TOWN OF TROY v.
EBLE ET AL.

APPELLATE PROCEDURE.—Sufficiency of Evidence.—The refusal of a new trial, asked on the ground of the insufficiency of the evidence, in a suit by a town to recover as part of a public street land fenced in by defendant, will not be disturbed on appeal where there was evidence that the strip in controversy had never been dedicated by the owner to the public.

From the Spencer Circuit Court.

I. S. Bramel and S. K. Connor, for appellant.

Mattison, Posey & Clark, for appellees.

MCCABE, J.—Suit by appellant to recover possession of a strip of land alleged to be part of the public street in said town, and which it is alleged defendants have fenced in so as to obstruct said street. Issues were made, tried, and resulted in a finding and judgment for the defendants. A new trial as of right resulted in a second finding and judgment for defendants. The only error assigned is the ruling on appellant's motion for a new trial, and the only reason for a new trial discussed in the appellant's brief relates to the sufficiency of the evidence to sustain the finding. There was evidence from which the court might have found that the strip in controversy had never been dedicated by the owner to the public.

In view of the rule that we will not reverse a judgment where there is evidence to sustain it, though controverted by other evidence, we cannot reverse the judgment in this case.

Judgment affirmed.

Filed January 28, 1896; petition for rehearing overruled April 8, 1896.

Myers et al. v. Boyd et al.

No 17,663.

MYERS ET AL. v. BOYD ET AL.

144	496
151	105
144	496
157	455

STATUTE CONSTRUED.—*Change of Construction.*—*Effect on Vested Rights.*—*Courts.*—The interpretation placed by the supreme court at the time of an administrator's sale of land for payment of debts, upon sections 2483, 2487, R. S. 1881, that a childless widow whose husband left children by a former wife took only a life estate in one-third of his lands, which interpretation was accepted by the court and all the parties to the proceeding, will be adhered to in determining the validity of such sale in a subsequent action to partition the land, notwithstanding a subsequent interpretation that it gives an estate in fee simple to such widow.

ESTOPPEL.—*Heirs Joining in Administrator's Sale of Land.*—*Life Estate of Widow.*—In a sale of land by an administrator, if the heirs, being the owners of one-third of the land subject to the life estate of the widow, join in the proceedings for the sale and accept the price paid for it by the purchaser, they are thereafter estopped to deny the validity of the sale of the one-third subject to the life estate.

From the Wayne Circuit Court.

T. J. Newkirk, for appellants.

T. J. Study, for appellees.

HOWARD, J.—This was an action brought by appellants against appellees for the partition of real estate.

Michael Myers died the owner of the real estate in question, leaving the appellants, his children by his first wife, except the appellant, Charles E. Templin, who is the only child of a deceased daughter by said first wife. Michael Myers also left surviving him his widow, Margaret, by whom he had no children. The appellants claim to be the owners of the undivided one-third of the land sought to be partitioned, as forced heirs of said Mar-

garet Myers, under provisions of the statute then in force. Section 2487, R. S. 1881.

To appellants' complaint for partition appellees filed a cross-complaint and a special answer, to each of which a demurrer was overruled. The appellants refusing to plead further, judgment was entered on the demurrers.

The overruling of the demurrers is the only error assigned. The appellees alleged in their cross-complaint, and also averred in their answer to appellants' complaint, that on the death of Michael Myers his administrator petitioned the court to make sale of all the land owned by said decedent at the time of his death, including his widow's interest therein, in order to make assets for the payment of his debts. Due notice of said petition was given to the appellants and to said widow; and all proceedings for said administrator's sale were taken as required by law. Said petition was filed, and the sale thereunder made with the full knowledge and at the desire and request of the widow and of the appellants, all of whom were parties to the proceedings. The widow appeared to the petition, consenting in her answer that the whole of said real estate should be sold, including the real estate and interest therein which had descended to her from her husband. This interest of the widow was conceived by her, and by all the parties concerned, to be a life estate in one-third of the land, and the sale was made with the understanding and agreement that the value of her said life estate should be fixed by the court after the sale should be made, and the same be paid to her by the administrator out of the proceeds, which was done.

The petition for the sale of the real estate was filed on November 9, 1880; the sale was made on February

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15, 1881; and on March 1, 1881, a deed, examined and approved by the court, was given to the purchaser by the administrator. On the same day, in pursuance of the agreement theretofore made, the widow, having received from the administrator the value of her life estate as fixed by the court, also executed to the purchaser her quit claim deed for the land.

On settlement of the estate there was left in the hands of the administrator, after payment of all debts and expenses of the estate, a balance of \$2,025.73, which balance was paid to the appellants as heirs of said estate.

The appellees claim title to the land through mesne conveyances, by virtue of the administrator's deed so given. At the time the deed was made, and for more than twenty-two years prior thereto, it was held, by the uniform decisions of this court, beginning with *Martindale v. Martindale*, 10 Ind. 566, that under the provisions of sections 2483 and 2487, R. S. 1881, a second or subsequent wife, having no children by her husband, took a life estate only in his lands where he left, upon his death, children alive by a former wife.

At the May term, 1881, this court, in the case of *Utterback v. Terhune*, 75 Ind. 363, whether wisely or otherwise, changed the interpretation theretofore given to the said statutes; and since the latter case, the holding of the court has been that, under said sections 2483 and 2487, a second or subsequent childless widow took a fee simple in her husband's lands, when he died leaving children alive by a former wife, such land to go to said children on her death.

But in *Haskett v. Maxey*, 134 Ind. 182 (19 L. R. A. 379), it was held that the construction placed by the court upon the foregoing statutes at the time a contract thereunder was entered into, must determine the rights of the parties; and that a subsequent change in the con-

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struction could not operate retroactively so as to impair the obligation of the contract.

In that case the following from *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 415, was cited and approved: "The sound and true rule is, that if the contract when made was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State, or decision of its courts, altering the construction of the law."

So it was said by Chancellor Kent (1 Com. 475): "If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it." See also *Stephenson v. Boody*, 139 Ind. 60.

In the case under consideration, the court trying the case, the administrator, the widow, the heirs, the purchaser at public sale, all understood and acted in accordance with the interpretation then, and continuously for years previous thereto, given to the statutes by the court of last resort, namely, that the widow took only a life interest in the undivided one-third of the lands left by her husband. We think the interpretation so made, and so understood by all the parties, should still prevail as to the sale thus made.

But it is said that the interpretation of the statute then made, and according to which the widow held only a life estate in the land, was simply as to her interest against the heirs, and not, as in the case at bar, against creditors; and that, in any event, the statute did not authorize the sale of the widow's interest, or the undivided one-third of the land, for the payment of the debts of the estate.

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That is a contention which, perhaps, might have been successfully made at the time of the administrator's sale; but it would seem that the parties to that proceeding are not now in position to make it. While it is evident, as said in *Windell v. Trotter, Admr.*, 127 Ind. 332, "that the widow who owned a life estate only could not affect the interest of the children, who owned the fee, by giving her consent to a sale of the whole land;" yet, as said in the same case, it is also clear "that the heirs cannot be heard to say that the land was not properly sold, because they were parties to the petition to sell, and are bound by the proceedings."

The heirs in the case under consideration, the appellants at bar, are further bound by their own ratification of that sale. The amount received for the sale of all the land was \$7,100. If we should consider that only two-thirds of this sum could be used by the administrator to pay debts, we should have \$4,733.33 to be used for that purpose. The sum actually used by the administrator was \$3,624.27, leaving \$1,109.06 to be paid to the heirs from the sale of two-thirds of the land. The amount actually distributed to the heirs, however, by the administrator was \$2,025.73. The difference between the last two sums was, therefore, money received by the administrator for the sale by him of the one-third of the land, the land here claimed by the same heirs. The one-third so sold by the order of the court belonged to these heirs, subject to the widow's life estate, as the law was then interpreted. These heirs joined in the proceedings for its sale, and they accepted, on distribution, their respective shares of the price received on such sale. They cannot now be heard to say that the administrator was not authorized to make the sale, nor the court to confirm it. Neither can they claim the land, having also received

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the price paid for it. Even, therefore, if the sale of the undivided one-third of the land by the administrator was unauthorized, the acts of the appellants, its owners, ratified the sale. *Wilmore v. Stetler*, 137 Ind. 127; *Waters v. Lyon*, 141 Ind. 170, at p. 178; *Axton v. Carter*, 141 Ind. 672.

The question turns altogether on the appellants' ownership of the land, subject to the widow's life estate. If the widow, in fact, owned the fee, the appellants could not ratify its sale; not being their land they could neither sell it nor ratify its sale. *Horlacher v. Brafford*, 141 Ind. 528. If, however, as the law was then construed, the appellants were the owners of the remainder in the land, subject to the widow's life estate, they could make a valid sale of that remainder; or, being parties to a proceeding for its sale, and acquiescing in such proceeding, and afterwards accepting the proceeds of the sale, they are now, in good conscience, estopped from claiming that the sale so made and ratified is invalid.

The judgment is affirmed.

Filed April 14, 1896.

No. 17,767.

STONY CREEK TOWNSHIP v. KABEL ET AL.

PARTITION FENCE.—Statute Construed.—The provision of the act of June 4, 1852, section 16, as amended, that if either of two adjoining owners fail to maintain his portion of the partition fence, as provided for "in the preceding section," it can be repaired by the township and the cost made a lien on his land, became ineffective when such preceding section was made void by a second amendment in violation of the constitution.

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STATUTE.—*Amendment of Section Previously Amended.—Void.*—An act purporting to amend a section of an act which has previously been amended is unconstitutional and void.

From the Randolph Circuit Court.

Thompson & Canaday and *F. C. Focht*, for appellant.

S. A. Canada, *E. L. Watson* and *C. L. Watson*, for appellees.

MCCABE, J.—The appellant sued the appellee, Philip Kabel, to recover the cost of rebuilding a partition fence between the lands of said Kabel and the lands of the other appellee, Willard Haynes, and the foreclosure of a lien therefor on the said lands of said Kabel, under the provisions of sections 6564 and 6565, R. S. 1894. The sections were enacted March 9, 1891 (Acts 1891, p. 399), as amendments to sections 15 and 16 of an act approved June 14, 1852, defining a lawful partition fence, etc., and being sections 4848 and 4849, R. S. 1881. The circuit court sustained a demurrer to the complaint, and the plaintiff failing to plead over, the appellee, Kabel, had judgment upon demurrer. The appellant assigns error upon this ruling. The point made in support of the ruling is that said section 15 had been previously amended, to-wit: by the act approved December 19, 1865, p. 182, and this we find to be true, and for that reason the act of 1891, assuming to amend it again, appellee contends, was void, because it was not in existence to amend. And further, that the amended section 16 depends entirely for its force and effect upon the existence of the amended section 15.

It is the settled law in this State that an act purporting to amend a section of an act that has heretofore already been amended is unconstitutional and

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void. *Feibleman v. State, ex rel.*, 98 Ind. 516; *Boring, v. State, ex rel.*, 141 Ind. 640, and cases there cited. The 16th section provides that "if either party fail to maintain his or her portion of such fence as provided for in the preceding section," etc., then the right to call on the trustee of the township to rebuild or repair the same is created, making the cost thereof a lien on the land of the failing owner, to be enforced as other liens are enforced.

But if there is no preceding section, as we hold there is not, providing for the maintenance of partition fences equally by the owners or occupants of lands on both sides, then there is nothing for section 16 to apply to. It being thus dependent on the existence and force of the other section of the act, and that section being unconstitutional and void, the whole must fall.

The circuit court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

Filed April 14, 1896.

No. 17,726.

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APPORTIONMENT LAW.—*Power of Courts to Pass Upon Constitutionality Of.*—An unconstitutional apportionment law may be declared void by the courts notwithstanding the fact that such statute is an exercise of political power.

SAME.—*When Apportionment May Be Made.*—A valid apportionment law can be passed only once for each enumeration period under our State Const., article 4, section 4, providing for an enumeration every six years, and section 5 requiring an apportionment at the session next following the enumeration,

SAME.—*Unconstitutional.—Declared Valid by Lower Court.—Not Binding on Legislature.*—An unconstitutional apportionment law,

144	503
144	107
145	72
145	87
145	90
147	193
147	204
144	503
149	258
150	250
151	201
144	503
153	77
144	503
162	577
162	578
144	503
166	170

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even if it has been declared constitutional by one of the lower State courts, will not preclude the enactment by the legislature of a valid apportionment law.

SAME.—County and Proportionate Representation.—Review by Courts.—The approximation to the dual constitutional requirements of county representation and proportionate popular representation in the enactment of an apportionment law by the legislature is not reviewable by the courts except for gross abuse of discretion, and providing both objects contemplated in the constitution are kept in view.

SAME.—Legislative District.—The requirement that legislative apportionment shall be according to the number of inhabitants, in State Const., article 4, section 5, is no less binding than the provision that counties united in a district must be contiguous, or that no county for senatorial apportionment shall be divided.

SAME.—Double District.—Double districts in which two or more counties are grouped and given a voice in the election of more than one senator or representative when neither of them has a voting population equal to the ratio for one senator or representative cannot be created under our State Const., article 4, section 5, requiring apportionment among counties according to the male inhabitants above twenty-one years of age, and section 6 providing that where more than one county shall constitute a district they must be contiguous.

SAME.—Constitutional Requirement.—Observance Of.—The obligation of observing a constitutional requirement as nearly as possible in an apportionment act becomes of binding force under the constitution when the exact requirement cannot be observed.

SAME.—Equality of Representation.—The injustice of allowing but one representative to a county while other counties having a similar population are given a voice in the election of more than one representative must be avoided whenever possible.

SAME.—Validity Of.—Estoppel.—The people of the State cannot be estopped from asking for a determination of the validity of an apportionment law by failing to bring the matter to a decision until after a legislature has been chosen in pursuance of the act. 535

JUDICIAL NOTICE.—Of Records in Another Case.—The court can take notice of its own records in another case, either on suggestion of counsel or upon its own motion.

SAME.—Of Census or Enumeration.—Legislative District.—Judicial notice will be taken of a census or other enumeration made under the authority of the State or United States, and also of the location, boundaries and juxtaposition of the several counties of the State.

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JUDGMENT.—*Res Adjudicata*.—*Constitutionality of Statute*—A judgment in an action brought by an individual is not conclusive in a subsequent action to which he is not a party nor even a relator, although both cases turn on the constitutionality of the same statute. COURTS.—*Stare Decisis*.—*Maxim*.—The rule of *stare decisis* does not bind the court in deciding the constitutionality of a statute where no property right or contract between the parties is involved.

From the Sullivan Circuit Court.

Harris & Douthitt, Miller, Winter & Elam, M. E. Forkner, W. A. Ketcham, Attorney General, A. W. Wishard and Bynum & Rooker, for appellants.

D. Turpie, B. K. Elliott, J. B. Brown, J. E. Lamb, J. T. Beasley, A. G. Smith and C. A. Korbly, for appellee.

HOWARD, J.—This was an action brought by the appellee to enjoin the appellants, as clerk of the circuit court, sheriff, and auditor of Sullivan county, from proceeding in their several official capacities to hold the election for 1896, for the election of senators and representatives in the general assembly, under or pursuant to the provisions of the apportionment act of 1895; and for a writ of mandate to compel said officers to proceed to hold said election for senators and representatives under the apportionment act of 1893.

The material allegations of the complaint are, that the appellee's relator is a citizen, tax payer and voter of said county, and appellants are the proper officers to give notices and furnish forms and ballots and take other steps for the holding of general elections in said county; that the general assembly of 1891, that being the proper time therefor, passed an apportionment act for the election of members of the general assembly, which act was afterwards declared unconstitutional by the Supreme Court; that afterwards the

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general assembly of 1893 passed an apportionment act, which is still in force and is the only valid law on that subject; that in 1895 the general assembly passed another apportionment act, which is unconstitutional; and, at the same time, by a second act, repealed the apportionment act of 1893, which repealing act is also unconstitutional and void; that by the act of 1893 said Sullivan county was entitled to one representative in the general assembly, and, conjointly with Vigo and Vermillion counties, was entitled to one additional representative, which said provision was useful and beneficial to said relator; that by the pretended act of 1895 Sullivan county is entitled to but one representative in the general assembly, and the relator is thereby deprived of the rights, privileges and benefits of said act of 1893; that before bringing this action said relator made demand of appellants that they proceed under and in accordance with the apportionment act of 1893 in performing their duties in regard to the election of senators and representatives at the general election in November, 1896; but that appellants refused so to act, and asserted that they would proceed under the said apportionment act of 1895; and that the appellants will so proceed unless enjoined therefrom, and will, unless commanded so to do by the court, fail, neglect and refuse to proceed under and in accordance with the act of 1893, to the great and irreparable damage of appellee's relator. It is further expressly alleged that the provisions of the act of 1893 "are constitutional and valid enactments;" and that the act of 1895 "is unconstitutional, fraudulent, abortive, void, and of no validity or effect for any purpose whatsoever."

The prayer was that injunction and mandate might issue. There was a waiver by appellants of service of process, and of the issuing of an alternative writ of

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mandate; and thereupon they tendered their demurrer to the complaint, which was overruled. Appellants refusing to plead further, the court entered judgment against them upon the demurrer. By the terms of the decree the appellants were enjoined from proceeding for the election of senators and representatives under the apportionment act of 1895; and were commanded to exercise their official duties in relation to said election under the provisions of the act of 1893.

The overruling of the demurrer to the complaint is the only error assigned on the appeal.

Appellee asserting the invalidity of the apportionment act of 1895, and also of said repealing act, and asserting the validity of the act of 1893, and asking for an injunction against the enforcement of the former, with a mandate compelling an enforcement of the latter, it becomes necessary, in order to decide what, if any, relief appellee is entitled to, first to determine the constitutionality of the act of 1895. If that is found to be a valid law, the case is at an end, for the appellee is not entitled to any relief. If, however, the act of 1895 should be found invalid, then it would become necessary to determine the constitutionality of the act of 1893; for, unless the act of 1893 should be found constitutional, the appellee would not be entitled to the writ of mandate in favor of its enforcement, even though the appellee might be entitled to have an injunction against the enforcement of the act of 1895.

The first reason given for the demurrer is, that the court has no jurisdiction over or of the subject matter of the action.

The basis for this contention is, that the making of an apportionment for membership in the general assembly is an exercise of political power, which has been committed by the people to the wisdom of the

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legislative branch of the State government; that the courts may not therefore interfere with the exercise of this power by the general assembly.

This, no doubt, speaking in broad terms, is true; but only to the extent provided by the people in framing the constitution. The courts cannot say how an apportionment shall be made, nor even whether any apportionment shall be made. The province of a court, however, is to say what the law is. If, then, a law is enacted, and its validity is brought in question, in a proper proceeding, and before a court of competent jurisdiction, the court must render judgment. That is the proper and necessary function of a court.

The sole standard by which the validity of a law is to be tested, is the fundamental law of the land. The constitution is the supreme law, to be respected alike by legislators and by courts. The people, through their constitution, having thus set up the courts as the tribunals to pronounce upon the validity of all laws, and having made the constitution itself the standard by which such laws shall be tested, the courts must determine whether any given law is in conflict with the constitution or not. They have no choice in the matter, but must pronounce judgment. And it can make no difference what the law may be. An apportionment law that violates the constitution must be held invalid, quite the same as any other. The question is not, what is the character or subject of the law, but whether it is in conflict with the constitution.

In recent years the validity of apportionment acts has been before the courts of last resort in at least four States besides our own. In two of these cases, in Wisconsin and Michigan, the courts held the acts unconstitutional; in the other two cases, in New York and Illinois, the acts were held constitutional; but in all four cases, as well as in this State, the courts, with-

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out hesitation, assumed jurisdiction of the subject matter of the controversy. *State, ex rel., v. Cunningham*, 81 Wis. 440 (15 L. R. A. 561), and *Ib.*, 83 Wis. 90 (17 L. R. A. 145); *Board of Superv's v. Blacker*, 92 Mich. 638 (16 L. R. A. 432); *Giddings v. Blacker*, 93 Mich. 1 (16 L. R. A. 402); *People, ex rel., v. Rice*, 135 N. Y. 473 (16 L. R. A. 836); *Parker v. State, ex rel.*, 133 Ind. 178 (18 L. R. A. 567); *People, ex rel., v. Thompson*, 155 Ill. 451. See, in particular, the forcible argument of Elliott, J., in his concurring opinion in *Parker v. State*, here cited.

In *State v. Cunningham*, *supra*, citing *Houston v. Moore*, 18 U. S. 1, the power and duty of American courts to determine the constitutionality of all laws is asserted in this clear and vigorous language: "By a course of judicial decisions, reaching from the earliest history of American government to the present day, without a dissenting voice, it has been adjudged that courts of justice have the right and are in duty bound to test every law by the constitution as the fundamental and paramount law of the land, governing all derivative power and the exercise thereof. The judicial department, with us, is the proper power under the constitution to declare the constitutionality of a law; and every act of the legislature contrary to the true intent and meaning of the constitution will be declared by the courts null and void, and of no effect whatever."

In so far, then, as an apportionment law violates the provisions of the constitution, it will, as in the case of any other act of the legislature, be declared void. It need hardly be said, however, that in so far as the constitution itself has made the apportionment of the State discretionary with the legislature, that discretion, as in any other case, will be scrupulously respected by the courts. Yet more, since the subject

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of apportionment is, in general, in charge of the legislative department of the government, wherever there is no positive injunction in relation to this matter laid upon the general assembly by the constitution, there also the courts will refrain from substituting their discretion in place of the discretion of the legislature.

Where, however, the constitution has spoken, and the voice of the legislature is heard in conflict with this voice of the constitution, then the courts will interfere, and will sustain the paramount law of the land as against its violation by the legislature. And to determine whether, in any given case, the constitution has been violated by an act of the general assembly, the courts will always take jurisdiction, whether the act be one for legislative apportionment or for any other purpose.

The remaining reason given for the demurrer is, that the complaint does not state facts sufficient to constitute a cause of action against appellants.

The main question in the case, as made by the pleadings, and as discussed by counsel in their briefs and in the oral argument, arises under this head, namely: Whether, under the constitution, any apportionment act could be passed at the time when the alleged apportionment law of 1895 was enacted.

The appellee contends that, since the constitution has fixed a time, once in six years, when an enumeration of the voters of the State shall be taken, and an apportionment of senators and representatives made by law, there is thereby created a limitation upon the power of the legislature to make such apportionment at any other time.

The appellants argue, on the contrary, that, since the making of an apportionment is an exercise of political power, and hence committed to the legislative department in the general grant of power to that

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department, therefore the legislature may exercise this function at any time; and that the provisions of the constitution requiring the enactment of an apportionment law at the beginning of each period of six years were inserted in the fundamental law so that such apportionment should be made at least once in six years, but were not intended as a prohibition upon the general assembly from making other apportionments as often as that body might deem best.

This question, we think, notwithstanding the elaborate and able arguments of counsel for appellants, must be decided in favor of the contention of appellee.

It is provided in section 1, of Article 4, of the constitution, that "The legislative authority of the State shall be vested in the general assembly, which shall consist of a senate and a house of representatives."

If there were no particular provisions in the constitution in regard to the subject of legislative apportionment, there is little doubt that, under the foregoing full and unrestricted vesting of legislative power in the general assembly, that body might, in its discretion, and at any time, enact laws for the apportionment of its members among the several counties or other districts of the State; or might, perhaps, provide that all the members of the legislature should be chosen by the people at large.

But section 4, of the same article, provides, that "The general assembly shall, at its second session after the adoption of this constitution, and every six years thereafter, cause an enumeration to be made of all the male inhabitants over the age of twenty-one years."

And section 5, of said article, contains the following provision: "The number of senators and representatives shall, at the session next following each period of making such enumeration, be fixed by law, and ap-

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other time. This would seem clear with respect to a general apportionment; and perhaps the same implication would extend to any particular reorganization of assembly or senate districts, by any law passed directly for that purpose."

Under our constitution, an enumeration is provided for every six, instead of every five years; and the implication that an apportionment law can be passed only once for each enumeration period, thus found by the Supreme Court of Wisconsin to be necessarily drawn from the words of the constitution of that State, must also be drawn from the like words of our own constitution.

Since the constitution thus provides that an enumeration of the voters of the State shall always be made as preliminary to the enactment of an apportionment, it is evident that the theory of the framers of the constitution was, that a valid apportionment can be made only after the taking of such enumeration; and that when such valid apportionment is once made, it should stand until after the making of the next enumeration. They did not, of course, contemplate the enactment of an invalid apportionment, or one made in violation of the letter and spirit of the constitution. If, however, a valid apportionment were once made, it could not be made over again. Being a valid apportionment, to change it before another enumeration of the voters could but result in an invalid apportionment. Hence it was provided that enumeration and apportionment should go together, the one to be the complement of the other. When the enumeration should be taken, and the consequent apportionment made, the work would be complete; and would not, therefore, be repeated, in whole or in part, until the succeeding six-year period should come,

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when the dual work should again be done.

But counsel for appellants say, that, even if it be true that an apportionment law can be passed but once for each enumeration period, yet if no valid law has, in fact, been enacted, the continuing duty to pass such a law at the earliest time practicable, always rests upon the law-making power, until such valid apportionment is finally made. *People, ex rel., v. Rice, supra.*

Counsel say, further, that the last enumeration was taken in 1889; that at the next session of the general assembly thereafter, in 1891, an apportionment law was passed; that this law was adjudged unconstitutional by this court. *Parker v. State, ex rel., supra.* That thereafter, in 1893, the legislature passed another apportionment law; that this apportionment law of 1893 was invalid for the same reasons for which the act of 1891 was held invalid; that the legislature of 1895 found this invalid act of 1893 upon the statute book, declared it unconstitutional and repealed it, and then passed the act of 1895, now under consideration; that the act of 1893 being unconstitutional, it was as if no apportionment law was in existence, therefore the continuing duty of enacting a valid apportionment law rested upon the legislature of 1895; and hence the act of 1895 was passed at a proper time, and is valid and constitutional.

Whether the legislature of 1895 had authority to enact an apportionment law must depend, as we have already seen, upon the fact as to whether there was then in existence a valid apportionment law, passed within the current enumeration period. That legislature could not by any act of its own create the necessity for the enactment of another law on the subject, as by repealing the law already in existence. If the apportionment act of 1893 were indeed a valid law, it

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could not be repealed by the legislature of 1895. For, in case of the validity of the act of 1893 it would most certainly have been unlawful to enact any other apportionment law until the next enumeration period; and the legislature could not change this condition by an attempt to repeal such valid apportionment to make room for another law on the subject. Such further law on the subject would have been premature, and out of due time as fixed by the constitutional mandate. The repealing act, therefore, which was passed in 1895, as preliminary to the enactment of the apportionment law of that year, was itself either a violation of the constitution, or else a vain and useless act, being the repeal of an invalid law.

But if the legislature of 1895 could not repeal a valid apportionment law passed in 1893, the question still arises whether the Legislature of 1895 could in any case pass an apportionment law? It certainly had the power to do so if there were at that time no valid apportionment law in existence, if the act of 1893 were in fact an unconstitutional law.

The ordinary and proper course to be taken to determine whether the act of 1893 was unconstitutional or not, was, as in other cases, to apply to the courts. These tribunals were open for the consideration of the validity of this, as of any other act of the legislature. As it is the province of the legislature to enact laws, and of the executive to enforce them, so it is of the courts to determine their validity. This would have been the fitting course, rather than to have the legislature itself cry out against the good faith of its predecessor, and to declare against the constitutionality of the very law under which it was itself elected.

In this case the indelicacy of the legislative criticism of a preceding legislature is the more marked when we reflect that, as shown by the files of this

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court in the case of *Wishard v. Lenhart*, No. 17,385, appealed from the Marion Circuit Court, that court had already found the act of 1893 to be a valid and constitutional law. It would have been more seemly, as well as more effective, to have pressed that case to a final hearing, rather than to have acted in defiance of the decision already rendered by the circuit court.

Some question having been made as to whether we can thus take notice of other records in this court, in considering a case at bar, we may here remark that we have no doubt that this may be done, whether the court make such inspection of its own motion or on the suggestion of counsel. See *Washington, etc., R. R. Co. v. D'Alene Ry., etc., Co.*, 160 U. S. 77.

But, apart from any consideration of propriety, the question recurs, could the legislature of 1895 assume to determine for itself the constitutionality of the act of 1893, and, on such assumption of responsibility, proceed to pass another act of apportionment, leaving to the courts to pronounce finally upon the question as to which of the two acts was constitutional?

We have no doubt that the legislature of 1895 had this power. The members of that body took the oath taken by all those who perform official duties, namely: that they would support the constitution. If those legislators believed, under their oaths, that there was no valid apportionment law in existence based upon the last enumeration, it was their solemn duty to pass such a law. Their enactment of such a law was in itself, in effect, an appeal to the courts to decide whether they were mistaken or not, and to say which of the acts, if either, was the valid and constitutional law of the State.

“Every department of the government,” says Judge Cooley, in his *Const. Lim.* (4th ed.), Chap. IV., “and every official of every department, may, at any time,

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when a duty is to be performed, be required to pass upon a question of constitutional construction."

And again, in the same connection, he says: "We shall find the general rule to be, that whenever an act is done which may become the subject of a suit or proceeding in court, any question of constitutional authority that was raised, or that might have been raised, when the act was done, will be open for consideration in such suit or proceeding; and that, as the courts must finally settle the controversy, so also will they finally determine the question of constitutional law."

It may be admitted, then, that, as both the act of 1895 and that of 1893 are before the court as acts of the legislature, in due form and duly authenticated, and the constitutionality of both is questioned, we must determine the validity of each. If on such examination one act is found valid and the other invalid, the case is ended; so also if both are found invalid. If, however, both acts should, in all respects, except as to the date of enactment, be found to comply with the constitutional requirements, then it would follow, from what we have heretofore said, that the act of 1893 being in itself a valid apportionment law, the legislature in 1895, or at any other time prior to the next enumeration, could have no warrant under the constitution to enact another apportionment law; and the act of 1895 would, for that reason alone, be void. While the act of 1893, being valid, would, during the enumeration period when it was passed, and until the passage of a valid apportionment act after the ensuing enumeration, be the sole law upon the subject of apportionment.

It therefore becomes necessary, apart from any question as to the time of the making of either appor-

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tionment, to determine the constitutionality of the act of 1895, and also of the act of 1893.

By section 4, of Article 4 of the constitution, as we have seen, an enumeration of the voters of the State is to be taken once every six years.

The ensuing sections, 5 and 6, of the same article, provide for apportionment, as follows:

“Sec. 5. The number of senators and representatives shall, at the session next following each period of making such enumeration, be fixed by law, and apportioned among the several counties, according to the number of male inhabitants above twenty-one years of age in each: Provided, That the first and second elections of members of the general assembly, under this constitution, shall be according to the apportionment last made by the general assembly before the adoption of this constitution.

“Sec. 6. A senatorial or representative district, where more than one county shall constitute a district, shall be composed of contiguous counties; and no county, for senatorial apportionment, shall ever be divided.”

It is clear from these sections, that, in providing for an apportionment of members of the general assembly, two main objects were kept in view by the framers of the constitution: One being local county representation; the other, proportionate representation of all the people. The counties, as governmental subdivisions of the State; and the inhabitants, according to their number in each county, were to be represented. The striking and comprehensive language of the constitution is: “The number of senators and representatives shall * * * be fixed by law, and apportioned among the several counties, according to the number of male inhabitants above twenty-one years of age in each.”

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Either of these objects, county representation, or proportionate popular representation, might be attained in perfection, were it not for the necessity of also attending to the other object; but the design was that neither be neglected or sacrificed for the other. The most exact proportionate representation would be secured by making a single district of the State, and electing all the members by the people at large. Each voter would thus have his absolute and equal weight with every other voter in selecting the members of the general assembly. But, besides resulting in the admitted evil of making the general assembly solidly of one political party, at least so far as elected at the same time, and thus wholly stifling the voice of the minority, this exactness of proportionate representation would also be attained at the total sacrifice of local county representation. On the other hand, if county representation only should be considered, then proportionate representation of population in large and in small counties would be wholly lost sight of.

To secure the fullest possible local county representation, with the nearest proportionate representation of the voters in each county, is the approximate result to be reached from these two requirements of the constitution. The working out of this approximation is a practical problem to be left to the patriotism and good judgment of the legislature, and hence not reviewable by the courts, except for gross abuse of discretion, and provided only, that both objects contemplated in the constitution be kept in view in the law enacted by the general assembly. *People v. Thompson, supra.*

By section 3, of Article 4 of the constitution, it is provided that senators shall be elected for a term of four years, and representatives for a term of two years, from the day next after their general election.

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And, in section 3, of Article 15, it is declared that whenever, either in the constitution or in any law thereunder, it is provided "that any officer, other than a member of the general assembly, shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified."

Construing these two provisions of the constitution together, it is apparent that the members of the general assembly remain in office only during the terms for which they were elected. Senators can, under no circumstances, hold office after four years, nor representatives after two years, from the day next after their general election.

So jealous were the people, in framing the constitution, of the possible usurpation of power on the part of the legislature that they thus expressly excepted members of the general assembly from that provision according to which all other officers are authorized to hold their offices until their successors are elected and qualified.

But while the general assembly is thus prevented from any attempt at perpetuating its existence by extending the terms of office of its members; yet there would be but little thus gained or saved to the people if the legislature might, through an unequal apportionment, perpetuate its power by ensuring the re-election of its members or the election of new members who should be in sympathy with those who thus engaged in usurping and perpetuating power against the will of the majority of the people.

The principle of proportionate representation has always obtained in Indiana, even from a time preceding the formation of the constitution of the United States. From the passage of the ordinance for the

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government of the Northwestern Territory, July 13, 1787, out of which territory our commonwealth was afterwards formed, this principle of proportionate representation has been of the very essence of our local self-government. The ordinance of 1787 names proportionate representation in the same category with the writ of habeas corpus, trial by jury, and due process of law, as fundamental rights to which the people of this territory shall always be entitled.

On the formation of our State government, in 1816, the constitution then adopted retained, in Article 3, the same principle of proportionate representation, based upon an enumeration of the inhabitants every five years. Finally, on the adoption of the present constitution, in 1851, the principle was still continued. So that, for over one hundred years, the unvarying law of this territory and State has been, as affirmed by the fathers of 1787, "The inhabitants of said territory shall always be entitled to the benefit of * * * a proportionate representation of the people in the legislature."

It is true that the ordinance of 1787, and the constitution of 1816, are no longer in force, only in so far as provisions of those instruments have been retained in our present constitution. The principle of proportionate representation in the legislature has, however, been so retained, and, consequently, has been the law here during the whole period covered by those three charters of free government in Indiana.

It is provided in the second section, of Article 1 of the constitution of the United States, that "The number of representatives shall not exceed one for every thirty thousand; but each State shall have at least one representative." Under the first census, Congress, in obedience to this provision of the constitution, fixed the number of representatives at one hundred and

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twenty. By this apportionment, Massachusetts was entitled to fifteen representatives, with an excess of 25,327, for which an additional representative was given. Other States, also having large fractions of population left after supplying their respective quotas of representatives, based on the given ratio, were each awarded an additional representative; while States having but a small excess were each denied an additional representative. President Washington, with the advice of Jefferson, Madison and others, vetoed the bill, as in violation of the constitutional provision, above set out, that "the number of representatives shall not exceed one for every thirty thousand."

The exact mathematical rule of apportionment, thus insisted upon in the beginning, proved unsatisfactory, inasmuch as it resulted in leaving a number of representatives unassigned, owing to the fractions of population left unrepresented after filling the quotas to which the several States were entitled by reason of their full ratios of representation.

The question continued to trouble Congress until 1832, when the rule adopted was, that after each State was given one representative, and also the full number to which it should be entitled by reason of its population, being one representative for each ratio, the remaining representatives should be assigned, one each to those States having the largest fractional remainders of population. This has since continued to be the law.

In advocacy of the rule of approximation thus adopted, Mr. Webster, then in the United States Senate, said: "The constitution therefore must be understood, not as enjoining an absolute relative equality, because that would be demanding an impossibility, but as requiring Congress to make an apportionment

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of representatives among the several States according to their respective numbers, as near as may be. That which cannot be done perfectly, must be done in a manner as near perfection as can be. If exactness cannot, from the nature of things, be attained, then the nearest practicable approach to exactness ought to be made. Congress is not absolved from all rule merely because the rule of perfect justice cannot be applied. In such a case, approximation becomes a rule; it takes the place of the other rule, which would be preferable, but is found inapplicable, and becomes itself an obligation of binding force."

The constitution of this State, like that of the United States, provides for an absolute rule of apportionment; not, as in some of our sister States, that the apportionment shall be "as nearly as may be," or "as nearly as practicable," according to the inhabitants of each county; but that it shall be, simply, "according to the number of male inhabitants above twenty-one years of age in each." Much, therefore, of what is said by the Court of Appeals of New York and the Supreme Court of Illinois, in *People v. Rice*, and *People v. Thompson, supra*, as to the discretion of the legislature in making apportionments, is inapplicable to the case before us.

Our constitution requires that legislative apportionment shall be according to the number of inhabitants; and that requirement is quite as binding as the injunction that a district formed of two or more counties "shall be composed of contiguous counties," or that "no county, for senatorial apportionment, shall ever be divided." One mandate of the constitution must be respected as well as another; and, as Webster said, if the mandate cannot be absolutely obeyed, it should be observed at least as nearly as may be. "The nearest approximation to exact truth or exact right,

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when that exact truth cannot be reached, prevails in other cases, not as matter of discretion, but as an intelligible and definite rule, dictated by justice, and conforming to the common sense of mankind."

While it is true, therefore, as already said, that the legislature has, and in the nature of things must have, large discretion in making an apportionment; yet, as held in *Parker v. State, ex rel., supra*, "it cannot be successfully maintained that the incumbents of any department of government have a discretion to disregard the constitution of the State. * * * It is safe to say, that where the act of either of the three departments is in violation of the constitution of the State, such act is not within the discretion confided to that department."

Considering, then, the act of 1895 in the light of these principles, the main objection urged against it is what are called the double districts, that is, the grouping of two or more counties, neither or none of which has a voting population equal to the ratio for a senator or a representative, and giving to the district so formed more than one senator or representative.

The court will take notice of a census or other enumeration made under the authority of the State, or of the United States; also of the location, boundaries, and juxtaposition of the several counties of the State. *State v. Cunningham, supra.*

By the act of 1895 the counties of Randolph, Delaware and Madison are grouped into one district, which is given two senators. By the enumeration of 1889, under which the apportionment of 1895 was made, there were in the county of Randolph 7,250 male inhabitants over the age of twenty-one years; in Delaware, 7,138; and in Madison, 8,010. The ratio, or average number of such voting inhabitants in the State, entitled to be represented by one senator in the gen-

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eral assembly, was 11,020. None of the counties in this double district, therefore, had a voting population equal to the ratio for a senator; and yet each of them is allowed to vote for two senators.

It was said in *Parker v. State, ex rel., supra*, in speaking of Clark county, and also of Brown county, in relation to the apportionment of 1891, each of those counties having a voting population less than the ratio for a senator: "When a county of that size has been assigned to a senatorial district, and given a voice in the election of one senator, it ceases, in our opinion, to be a factor in any legitimate scheme of apportionment for senatorial purposes."

That, in the act of 1895, the scheme of apportionment by which this double representation was secured, differs from the scheme or plan adopted in the act of 1891, can make no difference. The end attained is the same, whether it be done by a double district or by two single districts. In either scheme a county having less than the ratio entitling it to be represented by one senator is nevertheless given a voice in the election of two senators.

Indeed, the scheme adopted in the act of 1891 is the less objectionable. In that apportionment, the counties of Clark, Scott and Jennings, none of them having a population equal to the ratio, were joined in one district and given a senator. So the counties of Clark and Jefferson, neither with a population equal to the ratio, were formed into another district and given a senator. If the four counties were put into one district and given two senators, as they might have been, according to the scheme adopted in the act of 1895, the result could have been no more unjust than it was, the four counties controlling the election of two senators by either plan.

But in truth, the plan adopted in the act of 1891 is

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the more nearly equitable; for the reason that, by making two single districts, instead of one double district, it might be possible for each district to elect a senator of its choice, notwithstanding the vote of the common county thrown in to control each district; whereas if the four counties were thrown together the combination would be sure to carry both senators.

The plan of the act of 1891, condemned as it was, and rightly so, by this court, in *Parker v. State, supra*, was yet nearer to the constitutional standard, local county representation, than is the double district system of the act of 1895. So odious, indeed, has this double district system been regarded that in the constitutions of many of the States it has been specifically forbidden, and the single district system alone authorized, even so far as to require that a county entitled to more than one member should be divided into as many districts as there are members.

The observations made in regard to the double senatorial district of Randolph, Delaware and Madison, apply also to the district made up of the counties of Clinton, Boone and Montgomery; and likewise to that composed of the counties of Miami, Wabash and Huntington. None of those counties had a voting population equal to the number fixed for one senator; and yet each is given a voice in the election of two senators.

What is said of the double senatorial districts is likewise true of the double representative districts. The ratio for the election of a member of the house of representatives, according to the enumeration of 1889, was 5,510. The county of Perry had 4,152; Crawford, 3,076; and Orange, 3,454. None of these counties, therefore, had a voting population equal to the ratio for one representative; yet, by throwing the three into one district, each county was given a voice in the elec-

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tion of two representatives. The same may be said of the double representative district of Brown, Johnson and Morgan; and that of Monroe, Lawrence and Martin.

It may be replied, that by thus throwing counties into a double district, equality of proportionate representation is more nearly secured, and the fractions of population over and above even ratios are reduced in number and amount. If this argument were good, it should be pushed further. The greater the number of counties grouped into one district, the fewer will be the fractions of excess in population, and the more exact will be the proportionate representation of the people in the general assembly. If the number of counties in a senatorial district, and likewise in a representative district, were increased to ninety-two, being the whole number in the State, the perfection of equal proportionate representation would be attained.

But if the senators and representatives were thus elected by the people at-large, and on one ticket for the whole State, there would, as we have already seen, be a total loss of local representation, the most precious right of free government. The counties would be obliterated. Yet, as we have also seen, the constitution provides for county representation, quite the same as for proportionate representation. The words used in section 5, of Article 4, as already quoted, are: "The number of senators and representatives shall * * * be fixed by law, and apportioned among the several counties, according to the number of male inhabitants above twenty-one years of age in each." Local representation was deemed by the framers of the constitution to be as necessary as proportionate representation; so the members of the general assembly were not only to be apportioned "according to the number" of inhabitants, but were to be appor-

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tioned "among the several counties," and according to the number of inhabitants "in each."

The rule, as stated by Pinney, J., in *State v. Cunningham, supra*, citing Sedgw. Stat. and Const. Law, 200, and Endlich Interp. Stat., section 23, is, "that effect is to be given to every clause or word of a statute, and no word is to be treated as meaningless if a construction can be legitimately found which will preserve it and make it effectual; and this rule is applicable with special force to written constitutions, in which the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, leaving as little as possible to implication." Citing also Cooley Const. Lim. 72, and numerous other authorities.

In the section quoted from our constitution, not only are "the several counties" named as entitled to representation, but particular attention is drawn to the representation of the inhabitants "in each" of the counties. And in section 6, of Article 4, it is further provided that "no county, for senatorial apportionment, shall ever be divided." Regard for the integrity of the county, as a governmental subdivision of the State, is thus made an essential feature in every valid plan of apportionment.

The people of a county have common interests and objects peculiar to themselves, and intimate public relations with each other. Hence, when the constitution was formed, it was deemed of vital importance that the integrity of counties in the formation of legislative districts should be thus carefully guarded; "to the end, that each county having sufficient population should have its own representatives in the legislature, chosen by its own electors and them only, and owing

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no divided, perhaps conflicting, allegiance to any other constituency." True, because of the sparse population in certain parts of the State, it was, and is, necessary in some cases to include more than a single county in one district. This, however, is but a partial, though necessary, exception to the rule that each county is entitled to its own separate representative. See Chief Justice Lyon, in *State v. Cunningham, supra*.

Each county, and each district consisting of two or more counties, and being the least number having a population equal to the numerical unit for representation in the general assembly, is entitled absolutely to one member in Legislature. See also *Parker v. State, ex rel., supra*.

It is therefore apparent that in all the double districts formed by the act of 1895, although any one of the three counties so joined did not have a voting population equal to the ratio for a member in the general assembly; yet, that any two of such counties, being adjacent and having together such sufficient population, were quite as much entitled to their senator or representative as any single county with such population would be. The constitution protected them with such population from being overwhelmed by the unfriendly population of another county.

It may be urged that cases might arise when double districts would be necessary, in order to secure approximate equality in proportionate representation. It is certain, however, as we are satisfied, that other methods less obnoxious to the requirements of the constitution can be resorted to in such extreme and exceptional cases, should they arise.

In case of counties having a less voting population than the ratio of representation, and also in case of fractions of population left after giving to a county the representation to which it is itself entitled, great

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discretion must, of course, be left to the legislature in grouping such counties for representation. But in no case can a county having less than the ratio be so grouped with other counties as to have a voice in the election of more than one member of the general assembly, wherever it is possible to avoid it. And in disposing of such counties with population less than the ratio, and also in disposing of the fractions of excess of population over the ratio or ratios in other counties, as said by Chief Justice Morse, in *Board, etc., v. Blacker, supra*, "There can be no legislative discretion, under the constitution, to give a county of less population than another a greater representation." As in the apportionment for members of Congress, when the several counties have been given the representation to which they are severally entitled by reason of their full ratios, then the largest excess over such ratios should receive first consideration. These are salutary rules, to be applied in every case where it is practically possible to do so.

But, it may be said, when the legislature, in the exercise of its best judgment and discretion, has formed the several counties into single senatorial and representative districts, there may still remain large excesses of population over the ratios unrepresented. To this it may be answered as said in *Parker v. State, ex rel., supra*, "When it is found that exact equality cannot be attained, where the integrity of the county is preserved, approximation becomes a rule as binding upon the general assembly as any other rule fixed by the constitution.

* * * The constitution requires that the State shall be apportioned every six years according to the male inhabitants over the age of twenty-one years in each county. It contemplates the formation of districts, each embracing, as nearly as possible, an equal

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number of electors of the State. But the rule requiring an approximation to equality forbids the formation of districts containing large fractions unrepresented, when it is possible to avoid it, while other districts are largely over-represented."

This rule of approximation, thus prominently set out in *Parker v. State, ex rel., supra*, as it is also repeated and insisted upon in this case, must, of course, be understood as entering into every rule laid down in relation to apportionment. As said by Webster, when the exact requirement of the constitution can not be observed, then the obligation of observing such requirement as nearly as possible becomes itself of binding force under the constitution.

It is further urged against the apportionment law of 1895, that it violates sections 2, 3 and 7, of Article 4 of the constitution, by placing in districts having "hold-over" senators certain counties which, under a former apportionment, voted four years previously for senators, and should vote at the next election for successors to such senators; but which under this apportionment could not vote until two years later for senators, thus depriving the electors of such transferred counties from voting for senators oftener than once in six years, whereas they are entitled, under the constitution, to vote for senators every four years.

There can be little doubt that the transfer of counties from districts which would have elected senators at the next election thereafter to districts which would not elect until two years thereafter, might become a source of great abuse of legislative discretion; and if it appeared that such abuse of discretion were gross or wanton, or indulged in merely to disfranchise voters of certain counties, allowing them to vote for senators but once in six years, while voters in other counties were permitted to vote for senators once in

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two years, the apportionment thus made might be declared invalid.

While it cannot be said, as an abstract proposition, that such transfer of counties into "hold-over" senatorial districts, is in itself unconstitutional; because, if it were so held it might be quite difficult, or even impossible, with a due observance of other provisions of the constitution, ever to rearrange the senatorial districts in any six-year period; yet, on the assumption that such an outrageous act of injustice had been attempted and carried out in an apportionment, merely to give to the people of one set of counties an undue advantage over the people of other counties, we could find no words too strong to express our condemnation of such abuse of legislative discretion, and for this reason alone would not hesitate to declare such a law invalid. But having found it necessary to pronounce the act before us unconstitutional for reasons that admit of no uncertainty or doubt, we deem it unnecessary to further consider the abuse here suggested.

Some other unfair features of the act of 1895 are quite noticeable. For example, the county of Marshall, with a voting population of 6,150, or 640 over the ratio, is given but one representative; while the counties of Noble, Gibson, Daviess and Hamilton, each with a population less than that of Marshall, is yet given, not only one representative, but also a voice in the election of another; thus violating the principle that a county of less population than another should not be given a greater representation. It need hardly be added that such favoritism and injustice should be avoided wherever possible.

In the case of Daviess county, the additional representative was secured at the sacrifice of at least two other elements of a fair apportionment. The small excess in that county, 331, is used merely to make con-

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tiguous, and so control the vote of Knox and Dubois counties. Yet Dubois alone had nearly enough population to be entitled to a representative; and with the excess in Knox had more than enough to give the two counties such representative. The placing of Daviess with those two counties, being itself already assigned one representative, and throwing it between those counties in a forced union, so as to control the election of a second representative, has in it no element of justice or fairness, provided only such result could possibly be avoided. A like wrong is done in thrusting Gibson between Pike and Vanderburgh, which likewise could be justified only on the plea of absolute necessity.

Other instances may be found, not so objectionable, perhaps, but which would be absent from a perfectly fair apportionment. Thus it may be noted that the county of Tippecanoe had one full ratio, for which it was given a representative, with an excess of 4,340, for which it was given another representative; while the county of Tipton, with 4,386 voting inhabitants, was refused a separate representative.

The unconstitutionality of the apportionment act of 1895 being therefore evident from the provisions of the constitution, and from the principles established by the courts, and particularly by this court in the case of *Parker v. State, ex rel., supra*, it remains, in order to determine whether the appellant was entitled to the relief demanded by him, to inquire as to the constitutionality of the act of 1893.

The unconstitutionality of this act is readily apparent, both from what we have said as to the act of 1895, and also from the decision in the case of *Parker v. State, ex rel., supra*.

In the first place, there are two double representative districts. Neither Dubois, Martin, Orange nor

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Lawrence county had a population equal to the ratio for a separate representative; yet each of them, by being joined in one district, was given a voice in the election of two representatives. By simply applying the principles and arguments urged by counsel for appellee against the double districts formed by the act of 1895, we could but make a like holding as to the unconstitutionality of this double representative district formed by the act of 1893. The district of Adams, Jay and Blackford is even more objectionable. Neither Adams nor Blackford was alone entitled to a representative, though both together would have been entitled to one, while Jay alone was entitled to a representative; yet all three were joined and given two representatives.

So, in the senatorial apportionment, the county of Clark, which did not have a voting population equal to the ratio for one senator, was yet joined in one district to Scott and Jennings, and in another to Jefferson, and thus given a voice in the selection of two senators.

This act also, as does the act of 1895, offends against the principle that a county of less population than another should not be given a greater representation, unless it should be absolutely necessary to do so. The county of Shelby, with a voting population of 6,545, being 1,035 over the ratio, and the county of Dearborn, with a voting population of 6,382, being 872 over the ratio, are each given one representative, and also a voice in the selection of another; while the counties of Randolph, Delaware, Boone, Wabash, Huntington and Grant, each with a greater voting population than either Shelby or Decatur, are given each one representative only.

A graver violation of this principle is found in the case of the counties of Harrison, Ripley, Franklin,

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Sullivan, Putnam and Tipton, each having a voting population less than the ratio, but each of which is given a representative, being all that they could be entitled to; yet each of these counties is also given a voice in the election of an additional representative. The district consisting of Ripley, Franklin and Union is the most objectionable of this class, for the reason that Union, the only county of the district not already fully represented, had only 1,976 voters, and could not therefore by its own slight population uphold the representative. The offense of the legislature of 1893, as also of the legislature of 1895, against the commands of the constitution, is the more reprehensible from the fact that the decision of this court, in *Parker v. State, supra*, had then been made, and many of the violations of the constitution made in both those acts are shown to be such in that decision. Much, therefore, of what we have said as to the assumption of unlawful power by the legislature of 1895 is equally applicable to the action of the legislature of 1893.

To all the objections thus made to the constitutionality of the apportionment act of 1893 counsel for appellee make but one reply. They gravely contend that the constitutionality of the act of 1893 has been adjudicated and the act declared constitutional.

This contention is based on the judgment of the Marion Circuit Court, in the case of *Wishard v. Lenhart, supra*, to which we have heretofore referred, and the appeal from which judgment, No. 17,385, was dismissed in this court, on motion of the appellant, November 27, 1894. The purpose of that action was to test the constitutionality of the apportionment act of 1893; and, by the judgment of said circuit court, rendered upon demurrer to the complaint, the act was, in effect, held to be a valid law.

At furthest, and we should hesitate to give it that

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force without special plea, that decision could be controlling only within the jurisdiction of the court making it and between the parties to that suit. The binding force of such a decision, as said in 5 Chicago Law Jour. 863, quoting from Judge Cooley, goes only to this extent, namely: "A decision once made in a particular controversy, by the highest court empowered to pass upon it, is conclusive upon the parties to the litigation and their privies;" and again, "The doctrine of *stare decisis*, however, is only applicable in its full force within the territorial jurisdiction of the court making the decision."

Indeed, it is by no means clear how it was intended by counsel that the judgment here referred to should be treated as a former adjudication of the questions at issue in the case at bar. In the first place, the judgment has not been set out in the complaint, nor has it been in any way specially pleaded. Neither has it been pleaded on appeal, even if such plea could be made on appeal. *Eckert v. Binkley*, 134 Ind. 614. But even if such judgment were pleaded, it would seem that there could be no question of former adjudication entertained as counsel urge. "Before the rule of former adjudication can be invoked, it must appear that the thing demanded was founded upon the same cause of action; that it was between the same parties and found for one of them against the other in the same quality. The parties must not only be the same, but must also be suing in the same right." *Kitts v. Willson*, 140 Ind. 604. See further the learned work of Judge Van Fleet on Former Adjudication, Chap. 11, and generally.

It is enough to say on this feature of the question, that in the case in the circuit court, Albert W. Wishard was the party plaintiff; while in the case at bar

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the plaintiff was "The State of Indiana on the relation of Ferd E. Basler." The parties plaintiff were not the same, and for this reason alone the rule of former adjudication cannot apply. See *Glenn v. State, ex rel.*, 46 Ind. 368; *Maple v. Beach*, 43 Ind. 51.

In the former of these cases it was held that a judgment in an action brought by Margaret Clore against William Glenn, could not be considered as a former adjudication of the issue in an action brought in the name of The State of Indiana on the relation of Margaret Clore against William Glenn, although the facts were precisely the same in both cases. In the two cases now under consideration, it will be remembered that Albert W. Wishard, the plaintiff in the former action, is not a party, nor even a relator, in the case at bar.

Neither do we think there is any estoppel here, as in the case of *Vickery v. Board, etc.*, 134 Ind. 554, to which we are referred. There the party bringing suit to enjoin a levy of taxes to pay for bonds issued on purchase of a toll road, had waited until he received the benefit of the bonds before asking the court to declare unconstitutional the law under which they were issued. Here, while there may be some question of private or personal benefit, yet the issue before the court is much broader. The action concerns all the people of the State, in their most enlarged and sacred relations of citizenship and government; and the case cannot be tied up with the purely private rights of any one. It is true that an action to test the constitutionality of the law, if brought at all, should have been pressed to a final determination in the first place, and before the election of the present legislature, which is but a *de facto* body, in case the law of 1893, under

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which it was chosen, is invalid. Yet the people of the State, in their sovereign capacity, cannot for such reasons be estopped from asking for a determination of the validity of a law under which it is now proposed that they shall elect their next legislature. When the people of the State appear at this bar with such an issue, there can be no question of estoppel. The inquiry is one reaching to the foundations of the government.

While, then, all respect will be given to the judgment of the circuit court, in this, as in every other case, yet we cannot seriously entertain the contention that such adjudication of a constitutional question is of binding force in this court. More than this, no property right or contract between the parties being involved, it will not be considered that the rule of *stare decisis* requires that, in deciding so grave a matter as that of the constitutionality of an act of the legislature, we should be bound by even our own former decisions.

In such a case, as forcibly said by Chief Justice Bleckley, in *Ellison v. Georgia, etc., R. R. Co.*, 87 Ga. 691, the maxim for a supreme court, "supreme in the majesty of duty as well as in the majesty of power," is not "*stare decisis*," but "*fiat justitia*." Let this decision be right, whether other decisions were right or not.

In *Walsh, Treas., v. State, ex rel.*, 142 Ind. 357, involving the constitutionality of the fee and salary act of 1891, this court did not hesitate to overrule its own decision as to the validity of the same law, in *State, ex rel., v. Boice*, 140 Ind. 506, when satisfied that the decision first rendered was erroneous. See further, *Robinson v. Schenck*, 102 Ind. 307; and also the exhaustive discussion of this subject in *State v. Aiken* (S. C.) 26 L. R. A. 345, and authorities there cited.

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We are, therefore, of opinion that both the apportionment act of 1895, and also that of 1893, are unconstitutional and void; and, consequently that the appellee was not entitled to the relief demanded by him in his complaint, and which was awarded him by the decision of the trial court.

This court, in the case of *Parker v. State, ex rel, supra*, while deciding that the apportionment acts of 1891 and 1879 were both invalid, yet expressly held that the constitutionality of the intermediate act of 1885 was not before the court for adjudication, and accordingly refrained from making any decision in regard to it. Neither has the constitutionality of the apportionment act of 1885 been questioned in the case at bar. Consequently, that act is the last, and perhaps the only, expression of the legislative will left upon the subject of apportionment and under which senators and representatives may be chosen at the general election of 1896, unless the governor should see fit to call a special session of the legislature to pass a new apportionment law.

The judgment is reversed, with instructions to the circuit court to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

McCabe, J., concurs.

Monks, J., concurs in result.

Filed Jan. 30, 1896; petition for rehearing overruled April 15, 1896

CONCURRING OPINION.

HACKNEY, C. J.—While giving my full concurrence to the conclusions of the principal opinion it is my purpose to add one or two thoughts to what my associate has well said.

This suit, in form and effect, disaffirmed the consti-

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tutionality of the apportionment act of 1895 and affirmed the constitutionality of that of 1893. The decree of the lower court, by forbidding steps under the act of 1895 and commanding that such steps, towards the biennial election of this year, be taken under the act of 1893, held the law of 1895 to be void and that of 1893 to be valid. The question of the correctness of this holding of the trial court, thus involving both of said laws, is before this court.

The act of March 5, 1895, repealing that of 1893, and the other act of that date reapportioning the State, have been considered in the principal opinion, and properly, in my judgment, as one act, since, by the constitution it was not contemplated that the general assembly could, by repealing an apportionment act, deprive the people of the right to choose their representatives and could not supplant an apportionment act, properly enacted, excepting at the sexennial periods. The two acts mentioned were passed concurrently, and could have been separated only in the hope that if the second should not stand the first should have the effect to repeal the law of 1893 and require the next general assembly to be chosen under some prior law, or under some law which might be enacted by a special session made necessary by the absence of any apportionment law. The only remaining alternative would be that the people should be without a law under which to choose the next general assembly, an alternative probably not contemplated when these acts were passed, and one which the framers of the constitution certainly never intended should arise. That it was intended to carry down the act of 1893 at all hazards is manifest, not only from the express repeal of that act, but also from the language of the preamble to the repealing act. It is declared therein that the act of 1893 is unconstitutional and

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was intended by the general assembly which passed it to be unfair, unequal, in violation of the constitution and in disregard of a decision of this court. While thus assuming the judicial function of declaring an act of the general assembly unconstitutional, and while assuming the effect of that declaration to carry down the law of 1893, it is, by the last paragraph of the preamble, expressly conceded and declared to be the province of the courts to pass upon the constitutionality of laws. The effect of this preamble is a question in this case. It voices the conclusion of its authors that the power to enact an apportionment law, out of the sexennial period, depends upon the non-existence of a constitutional law apportioning the State; hence, the express declaration that the law of 1893 was unconstitutional. There is but one other possible construction of the preamble, and that is that its authors desired simply to challenge the integrity of those who had preceded them in the high office of legislators, and who had taken an oath to support that constitution which is said, by this preamble, to have been wilfully violated. This latter construction is not essential to the principal object: the passage of a new apportionment act. The former construction was regarded as essential to that end, and stands in this case as the justification for reapportioning the State before the period contemplated by the constitution. As said in the principal opinion, and as practically conceded by the closing paragraph of the preamble, the declaration that the law of 1893 was void was beyond the authority of the general assembly, was the exercise of judicial power and is now without force. It is even more than this, it is a declaration that those who made it held their places as members of the general assembly alone by virtue of the very law declared by them to have been void and of no effect.

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These considerations are pertinent, not only to a decision of the question of the power of the general assembly to exercise judicial functions, but they are of moment in looking to the consequences which may follow such exercise of power and the possible consequences of this proceeding. All tribunals of organized society accord to precedent respectful observance, and generally obedience, unless such precedent is palpably at variance with justice, morals or the fundamental law. Especially do the members of society owe this observance and obedience to the written laws. None rest under this obligation more fully than those who make and those who execute the laws. It is the precedent established by this court in the Parker case (133 Ind. 178), which is urged by the appellants, to overthrow the law of 1893, and by which, in a great measure, we are controlled in passing upon that and the act of 1895. No tribunal can maintain long the respect of society if it may wantonly, or even with indifference, reverse today its action of yesterday. This is true whether that tribunal is judicial or legislative. The same rule, which is certainly our guide, should be the guide of other co-ordinate departments of the government.

Finding the act of 1893 upon the statute books and bearing in mind that no valid act could be passed at that period in the absence of the conclusion that the act of 1893 was void, the Legislature assumed and declared that such act was void. If this may be done in any case it may be done in every case, and the legislature may be found repealing its enactments at each succeeding session. The spirit of the constitution forbids this with reference to apportionments, and tolerates it only in the event that such conclusion is unmistakably correct.

One of the consequences of the law of 1895 was to

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require judicial investigation and decision as to which of two laws should be observed by the people; both could not stand; the first being valid there could be no authority for the second. Another consequence was that it supplanted a law no more objectionable, under the constitution, than itself. Looking beyond the mere partisan advantage to be gained by the enactment of either law, what shall become of the principle of local self-government and the prerogative of proportionate representation? It is a more than important question; it is, in view of the present situation, startling. There is, by the invalidity of the acts of 1893 and 1895, no apportionment law since that of 1885, which has not been found, upon judicial investigation, to have violated the constitution. The law of 1879, the last before the act of 1885, was held, in the Parker case, to be unconstitutional. When the acts of 1893 and 1895 fail, where shall the people look for the apportionment, a necessary prerequisite, upon which to elect the next general assembly? It may be said that the governor will convene the last chosen general assembly in special session for that purpose. While the enactments of merely *de facto* legislators are generally upheld for the peace and good order of society, it may be seriously questioned whether one chosen under a void law is a *de facto* officer continuously for the mere purpose of keeping the office filled. A merely *de facto* officer is not, usually, entitled to hold for a full term, in an office whose functions are in continuous operation, when a *de jure* officer is chosen during such term.

De facto officers get no power or authority from the acts they perform, but the principle which supports the acts of such officer is that the public, finding him in actual possession of the office and dealing with him, under circumstances of reputation and color which

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would lead men to suppose him a legal officer, such dealings are validated on the ground of public policy. But there are authorities, though we have no occasion to apply them in this illustration, to the effect that when the want of authority in such officer to perform the acts in question becomes notorious the reason for the *de facto* doctrine ceases. An essential feature of the doctrine would seem to be that it is considered only with reference to past acts and not as justifying further acts and the continued right to occupy the office where the duties of the office are not in continuous exercise, but at the close of a session cease forever, unless specially called into action before new officers convene in regular session again.

This would not only suggest the doubts arising to influence the governor in calling or declining to call together persons who had occupied, *de facto*, an office not in continuous operation, and one which, it has become notorious, they held without the sanction of law, but as suggesting also the possible right of the people to elect, at the next election, *de jure* senators to represent them instead of those chosen under a void law.

Another fact which might be influential upon the mind of the executive, as to his duty to call a special session of the general assembly, is the fact that at the regular session, while condemning the act of 1893 for its violation of the constitution, another law was enacted as grossly violating the same principles of that sacred instrument. If the special session should repeat the disregard of existing enactments and the decisions of the courts, no relief would come, and it would be no less anarchistic to deprive the people of a constitutional choice by affirmative legislation than by no legislation. But, I apprehend, the governor would be slow to call a special session when the act of

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1885 stands upon the statute books unchallenged, and when this court, in the Parker case, where the question was made, expressly declined to declare it unconstitutional, though the acts of 1879 and that of 1891 were both held void. I should probably say, however, that the governor, in discharging his duty, has the same power, subject to the same limitations, to regard existing apportionment laws as constitutional or unconstitutional that the general assembly had.

It is insisted, however, that by the constitution an apportionment law becomes, by the lapse of time, inoperative after six years, and that, therefore, all acts prior to 1891 have expired. There can be but little doubt that the command of the constitution is mandatory and exclusive in that it requires an apportionment at each six-year's period, and forbids it at other times. It is no less clear, in my judgment, that, as maintained in the principal opinion, the duty enjoined is continuing and may be discharged subsequently, if not discharged as commanded. This conclusion renders another conclusion inevitable, and that is that the choice of the people is a right to be exercised upon the rule of apportionment existing at the time the neglected duty should have been performed. If this were not so there would never be a legislature following that which had neglected its duty to supply the basis for choosing the next. I cannot believe that the framers of the constitution contemplated the surrender by the people of the power to elect representatives to the general assembly, at the expiration of a sexennial period, in the event of a failure to enact a law or the enactment of an invalid law. If it had been intended to make the continuance of this power dependent upon legislative action, there was no reason for the mandatory provision of the constitution as to apportionment; the whole subject would have been

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left with the legislative department of the government. Nor can I believe it intended that, in the absence of renewed legislative apportionment, the reserved right to elect an assembly was to be exercised upon some basis to be determined by the masses.

Such a rule would be simply a substitute for a constitutional provision, and its enforcement, where party spirit becomes so intense as it does with us, would be fraught with difficulties certainly never intended to be left unguarded by constitutional restrictions.

The assembly of 1855 found no enumeration upon which to make an apportionment as then required, and, in the election of 1856 the assembly was chosen upon the prior apportionment. The assembly so chosen, at its session in 1857, without enumeration, apportioned the State, and without question and without further apportionment the assemblies following that session were elected, under that apportionment, until Governor Morton, in January, 1865, called the attention of the session, then sitting, to this long continued failure of duty. At no time in the history of the State has an assembly been chosen upon a ratio adopted by common consent further than where the Legislature has failed to adopt an apportionment, elections have been held under the last preceding apportionment without objection, thereby giving construction to the constitution in accordance with the view now suggested, namely, that the act of 1885 is the last apportionment which stands unquestioned, and is that upon which the next election must be held if that law remains unquestioned.

That an apportionment does not lapse by the expiration of the six-year's period, in the absence of renewed valid apportionment, was, in effect, held in the Parker case, where, as I have said, this court declared the act

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of 1891 unconstitutional and passed back of the law of 1885, notwithstanding the rule that courts never pass upon constitutional questions when a case may be decided without doing so, and held unconstitutional the act of 1879, then standing through more than two periods of six years.

Whether that act shall continue unquestioned; whether the people will follow the custom in such cases and make their election under that law, or whether that custom will be abandoned and public officers will refuse to follow it and thereby defeat the constitutional object to convene an assembly in 1897 depends upon the wisdom and patriotism of the people. I cannot believe that the governor would assume to declare the act of 1885 unconstitutional, to abandon the custom of the people construing the constitution in like cases, and then having done so, recall the last chosen assembly, with doubts as to its further authority, for the enactment of a new law. If the act of 1885 should, in proper proceedings, be declared invalid, and no preceding valid act of apportionment should be found, the maintenance of the legislative branch of the State government would hang upon the doubtful proposition that the governor could convene in special session, from the members last chosen, a *de facto* general assembly.

That such frightful consequences are possible from the character of the legislation now under consideration would seem to demand serious reflection, and such patriotic submission to the welfare of the government as would subordinate mere partisan advantage.

Filed January 30, 1896.

CONCURRING OPINION.

JORDAN, J.—I concur in much of the reasoning of the principal opinion of the court, and in the conclu-

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sion reached that the judgment below must be reversed. I also concur in the holding that the act of 1893, under the decision of this court in *Parker v. State, ex rel.*, 133 Ind. 178, is unconstitutional and therefore void. I am of the opinion that the formation of double districts should be condemned, and ought never to be resorted to by the legislature in the enactment of an apportionment statute, unless, in the sound discretion of that body, in some particular instance, on account of the situation of some counties, and their voting population, it may become absolutely necessary to do so, in order to attain that equality of representation required by the organic law of the State. Or, in other words, I am not prepared to declare a "hard and fast rule" upon this question from which the legislature can in no event depart.

Filed January 30, 1896.

No. 17,745.

THE STATE v. ADAMS EXPRESS CO., AMERICAN EXPRESS CO. AND UNITED STATES EXPRESS CO.

[CONSOLIDATED ACTIONS.]

144	549
146	68
147	275
144	549
150	28

TAXES.—State Board.—Express Companies.—The State board of tax commissioners is not confined for its information as to the value of the property of an express company, to the statements furnished by them as provided by statute, but may resort to such other information as they have or are able to obtain.

SAME.—State Board.—Unit System.—Routes of Companies.—In assessing express companies the statute authorizes the State board of tax commissioners to use the unit system of valuation, and in so doing the length of the routes and the proportion of such length within the State may be taken into consideration.

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SAME.—Unit System of Valuation.—The object of the unit system of assessment is to prevent destruction of values by disruption and disintegration, and therefore the whole property used in the business is first valued, which necessarily includes all the local properties, and then so much of the whole value thus ascertained is apportioned to this State as its amount and value bears to the amount and value of the whole property.

SAME.—Express Companies.—Right to Assess Routes.—The length of a route of an express company has a bearing on the earning capacity of the property employed in the business, and the earning capacity determines the value of such property. Hence an assessment on the route of the company within the State under the unit system was proper and right.

From the Marion Circuit Court.

W. A. Ketcham, Attorney-General, *A. G. Smith*,
L. O. Bailey and *M. Moores*, for State.

Baker & Daniels and *L. Maxwell*, for appellees.

MCCABE, J.—The appellant, the State of Indiana, sued each of the above named express companies in the Marion Circuit Court to recover certain taxes alleged to have been assessed and levied on the property of said several companies within this State by the State board of tax commissioners. The right to maintain such suit at the election of the attorney-general of the State is conferred by section 11 of the act of March 6, 1893, supplementary to the general tax law of 1891. Acts 1893, p. 381 (R. S. 1894, section 8488). The same questions of law were involved in each case and the questions of fact involved in each were so very similar that the three cases, after separate issues had been joined in each, were, by agreement of both parties by order of the trial court, consolidated for the convenience of all in the trial.

On proper request the trial court trying the cases without a jury made a special finding of the facts in all particulars, where such facts were not exactly alike

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in all the cases they were found in such a manner as to make them readily applicable to the proper case. One conclusion of law is stated which is alike applicable to each case, and that conclusion is "that plaintiff ought not to recover anything in this action from the defendants, or either of them."

The findings show that each of said companies made the report to the auditor of State under protest required by section 3 of said act (R. S. 1894, section 8480), verified by an officer or agent of such companies respectively, of the total capital stock, the number of shares of such capital stock issued and outstanding, with par value of each, the principal place of business, which was in each case outside of this State, the market value of said shares on the first day of April next preceding, the real estate, structures, machinery fixtures, and appliances owned by each and subject to local taxation within the State of Indiana, the location and assessed value thereof in each county or township where the same is assessed for local taxation, the specific real estate, together with the improvements thereon, owned by each of said companies situate outside of the State of Indiana and not used in the business with a specific description of each piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated; all mortgages upon the whole or any part of the property of each, together with the dates and amounts thereof; the total length of lines or routes over which they transport merchandise, freight or express matter; the total length of such lines or routes as are outside of the State of Indiana of each; the length of such lines or routes of each within each of the counties and townships within the State of Indiana.

That the auditor of State, as required by section 6

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of said act (R. S. 1894, section 8483), laid each of said reports or statements before the State board of tax commissioners when they met for the purpose of assessing railroad and other property.

It is also found that each of said companies had contracts with certain railroads named by which the exclusive right to transport express matter over such lines of the railroads over which the route of each extended in such a manner that no two or more companies could transport such express matter over the same line or route or any part thereof in the State of Indiana.

That upon the presentation of said reports or statements of said companies, respectively, to the State board of tax commissioners, they proceeded to value and assess the property of each of said companies for the years 1893 and 1894 respectively. They proceeded, as we construe the finding, as they were required to proceed by the act mentioned, having first ascertained the number of miles of route of each in this State from said statements and assessed the Adams Express Company and the American Express Company each at the amount of \$250.00 and the United States at the sum of \$175.00 per mile of their routes respectively in this State for said years.

The court finds the number of miles of each of said routes in this State respectively; that such assessment was certified to the auditor of State as required by the act, and he in like manner had certified to the several county auditors, who also had fully complied with the requirements of the act in relation to such assessments.

It is further found that each of the defendants has paid the taxes assessed against the property of each subject to local taxation, but that neither of them has paid any part or portion of the taxes so assessed

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against them, or either of them, by the State board of tax commissioners.

The objection to the payment of such tax by the appellees cannot be better stated than in the plausible and persuasive language of their learned counsel, as follows: "Briefly stated, the defense is that the assessments sued for are not made in respect of any property belonging to the defendants in the State of Indiana, or subject to the taxing power of the State. It is admitted by the attorney-general that the defendants were assessed in 1893 and 1894 for State, county, municipal and other purposes upon all their property in the State subject to local taxation, and that they had paid all such assessments. The further tax now sued for is a tax of \$250.00 per mile against the American and Adams and \$175.00 against the United States Express Companies upon each mile of their routes in the State of Indiana. We contend that the 'route' of an express company, which owns neither the road nor cars over which it does business, is not property."

If the assumption of fact contained in the proposition of counsel were well founded, we should find it difficult to resist the legal conclusion sought to be drawn therefrom.

We agree with appellee's counsel that the assessment of the tax must be made and levied upon actual property, and that property must be within the State of Indiana. Nor can the State call something property that is not property and tax a person or corporation or copartnership thereon as property.

To do so in relation to these appellees who are engaged in interstate commerce would violate the federal constitution. *Fargo v. Michigan*, 121 U. S. 230; *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S. 336.

But it is conceded that the State board of tax commissioners is shown to have proceeded in exact ac-

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X cordance with the provisions of the act in question, the 7th section of which (R. S. 1894, section 8484) provides, after the presentation of the statements by said companies already mentioned and required by a previous section to the State board of tax commissioners, that: "Said * * * board * * shall first ascertain the true cash value of the entire property owned by said * company * * * from said statements or otherwise, for that purpose taking the aggregate value of * * the capital stock: * * * * Such board of tax commissioners shall, for the purpose of ascertaining the true cash value of the property within the State of Indiana, next ascertain from such statements or otherwise, the value for taxation in the localities where the same is situated, of the several pieces of real estate situate without the State of Indiana and not specially used in the general business of such * * companies * * *, which said assessed values for taxation shall be by said board deducted from the gross value of the property as above ascertained. Said board * * shall next ascertain and assess the true cash value of the property of such * * companies * * * within the State of Indiana, by taking the proportion of the whole aggregate value of said * * companies * * * * *, as above ascertained, after deducting the assessed value of such real estate without the State * * * shall be the proportion of the whole aggregate value after such deductions, which the length of the lines or routes within the State of Indiana, bears to the whole length of the lines or routes of such * companies * *, and such amount, so ascertained, shall be deemed and held as the entire value of the property of said * companies * * within the State of Indiana. From the entire value of the property within the State of Indiana so ascertained, there shall be deducted, by the said board

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the assessed value for taxation of all the real estate, structures, machinery and appliances within the State and subject to local taxation in the counties and townships, as hereinbefore described in item 5, of sections 1, 2, 3 and 4 of this act, and the residue of such value so ascertained, after deducting therefrom the assessed value of such local properties, shall be by said board assessed to said association."

It is very clear, we think, if the board followed this statute, and it is practically conceded by the appellees that the finding shows that to be the case, that their entire assessment was every particle of it, on actual property and not on a myth or wind or air or sunshine. And it was property within the State of Indiana. Their assessment was on all the property in the several counties in the State subject to local taxation, which, for the purpose of arriving at its true and actual value, must, as the legislature has wisely provided, be united with all the property owned and used by the company in the prosecution of its business in what ever State situate. It is but reasonable that when such property is broken into fragments and the several parts are disconnected, not only is the unit destroyed, but the several fragments separated from the united system to which they belonged and in which they each serve an important purpose in the one connected and harmonious system, the proportionate value of each when thus separated may be greatly reduced.

To avoid this great destruction of values, the act in question authorizes the system of valuation known as the unit system of valuation, that is, by valuing the whole property employed in any one of the peculiar classes of business named in the act into whatever number of States that property or parts thereof may be carried and used in the prosecution of such business; and then by the use of the means and methods

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authorized by the act, apportioning to Indiana its fair proportion of the whole value according to the proportion of the whole property used in this State.

The length of the routes is required to be stated as one means of arriving at the true value of the property. Because common sense and general knowledge teach that the length of a route, such as those involved here, has a direct bearing upon the earning capacity of the property employed in the business. And the earning capacity of a property has a direct bearing upon its true value. The tax is not assessed upon the mere miles of the routes of such companies, but it is upon their property, the number of miles of their routes within this State, as compared with the number of miles of such routes outside of the State, and other facts being resorted to under the authority of the statute, as before observed, as one of the means of apportioning to Indiana its just and fair proportion of the value of their property in this State for taxation. The State board of tax commissioners is not confined for its information as to the value of property to be assessed to the statements mentioned. Section 6 (R. S. 1894, section 8483) authorizes them to resort to "such other information as they may have or obtain" for that purpose.

So that we see that it is not true that the assessment of so much per mile on the whole number of miles of the route of each company in this State was made on a myth; that the appellees claim that such assessment was not made in respect to any property belonging to them in the State of Indiana is wholly unfounded in fact or law. On the contrary, it was made upon that portion of the whole property belonging to each of the companies that was used in the prosecution of their business in the State of Indiana; and its value was fixed and ascertained by apporportion-

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ing such a part of the value of the whole property as the proportion thereof in this State bore to the whole property.

Appellees' learned counsel seem to suppose that because the board did, as authorized and required by the statute quoted, deduct from the gross amount of their assessment the assessed value for taxation of the local properties in the several counties and townships of this State as fixed by the local assessing officers therefor, the remainder constituting their assessment certified to the State auditor is not an assessment on such local properties. But that is a grave mistake of both law and fact. The very object of the unit system of assessment is to prevent the destruction of values by disruption and disintegration. Therefore, the whole property used in the business is first valued, and necessarily that included all the local properties in this State, and then so much of the whole value thus ascertained is apportioned to Indiana as its amount and value bear to the amount and value of the whole property.

This system of valuation has been directly upheld by this and other courts to the fullest extent in *Western Union Tel. Co. v. Taggart*, *Aud.*, 141 Ind. 281; *Western Union Tel. Co. v. Henderson*, 68 Fed. Rep. 589; *Western Union Tel. Co. v. Attorney-General*, 125 U. S. 530; *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40; *Pullman Palace Car Co. v. Hayward*, 141 U. S. 36; *Pittsburgh, etc., R. W. Co. v. Backus*, 133 Ind. 625; *Pittsburgh, etc., R. W. Co., v. Backus*, 154 U. S. 421; *Cleveland, etc., R. W. Co. v. Backus*, 154 U. S. 439.

But it is insisted by the learned counsel for the appellees that there is a marked distinction between these cases and the case at bar; that these cases upheld the assessments because they were based on

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tangible property such as the actual physical telegraph lines, including poles and wires in the telegraph cases, and the right of way, rails, ties, rolling stock, etc., in the railroad cases. And it is further urged that the suggestion of the attorney-general that the contracts of the express companies with railroad companies might be treated as property that could be taxed against the express companies is not tenable to support the assessments, because they are not, and do not purport to be assessments of the value of any such contracts, and the act does not provide for bringing them before the State board, or for having the board estimate their value. While it may be conceded that this contention as to such contracts ought to be upheld, yet such contracts do serve an important purpose in the whole investigation before the board. They established a direct connection of all the property, unity and fixity of routes or lines on which such property of the given company was used in the prosecution of their business and thus established its united character. It may have been that the purposes for which the property was used would have been sufficient to establish its unit character, but the contracts mentioned put that beyond cavil.

And it was the property thus brought into oneness that was assessed and valued, and the proper part of that assessed value was apportioned to Indiana.

While the court found that the defendants had no property in Indiana during the years 1893 and 1894 except certain messengers' safes used on through routes and the local properties assessed by the local officers, it did not find that this whole property had not been assessed and valued, but, on the contrary, the whole finding shows that it had been so assessed and valued according to the method and means prescribed in the act for ascertaining its true value.

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Just such an assessment under a statute in all material respects exactly like ours was upheld by the Supreme Court of Ohio in *State, ex rel., v. Jones, Aud.*, 37 N. E. Rep. 945, also by the Circuit Court of the United States for the Southern District of Ohio in *Adams Exp. Co. v. Poe*, 64 Fed. Rep. 9, and by the United States Circuit Court of Appeals, for the sixth circuit, in *Sanford v. Poe*, and *Fargo v. Poe*, 69 Fed. Rep. 546.

An attempt is made to distinguish these cases from the case at bar, by the learned counsel for appellee. They accordingly insist that there was but one statute for the taxation of the property of express companies in Ohio, while there are two here. But that is a mistake. The act of March 6, 1893, is supplemental and amendatory to that of March 6, 1891, and therefore must be construed as a part of that act. *Western Union Tel. Co. v. Taggart, Aud., supra.*

The local properties of such companies are subject to taxation in the localities where they are situate by the former act, but the two acts must be construed as one and the same act. *Western Union Tel. Co. v. Taggart, Aud., supra.* So that we have a statute authorizing the local properties of such companies to be assessed for taxation by the local taxing officers where such properties are situate in their disintegrated and fragmentary condition, wholly disconnected from the harmonious whole to which they belong, and because that may not be their real and true value, the same statute authorizes the whole to be brought together and valued as a unit, and to the end that such localities may not be deprived of their local rights in the taxation of such property, the amount of such local assessments is to be deducted from the whole value if it shall show an increase of valuation by uniting the

whole for valuation. That, at the same time, avoids the injustice of double taxation.

There is no complaint here that the assessment was too high, but the complaint is confined solely to the objection that the assessment is not on property. This, we think, we have shown is not true, either as a matter of law or fact. It is not surprising that the increase in the burdens of taxation brought about by the act in question on the property of such companies should arouse complaints. Hitherto such companies, for want of proper legislation have well nigh escaped taxation in this State. It is but natural that the tax-gatherer should be made an unwelcome visitor by many good people. But the good citizen should take comfort in the payment of his taxes when reminded that it is such payment that enables the majesty of the law to walk by his side and shield and protect him against the lawless and violent both day and night in the enjoyment of his life, liberty and property.

So, too, these appellees have great need of such protection, and ought to contribute their just share to support the government that affords it. The law, with sword and buckler, goes with their agents in their perilous journeyings throughout the State, by day like a pillar of cloud and by night like a pillar of fire, to guard the valuable treasures and precious freight they transport for hire, from burglars and robbers.

We are of opinion that the circuit court erred in its conclusion of law.

The judgment is reversed and the cause remanded, with instructions to restate the conclusions of law in accordance with this opinion, namely, that the plaintiff is entitled to recover in each case the amount of tax assessed against each appellee by the State board of tax commissioners, as found by the court, and 50 per cent. penalty thereon in each case, and that each

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of the judgments to be rendered upon such conclusion of law bear interest at the rate of 6 per cent. per annum from the date of the finding, and the court is instructed to render judgment accordingly.

Filed Dec. 21, 1895,

No. 17,088.

HOLLAND v. SPELL.

EVIDENCE.—Admission.—Decree and Papers in Former Suit.—Trespass.—The papers and decree in an injunction proceeding, to restrain the entry of a tract of land for the extension of a given street, in which plaintiff in his reply alleges that it was agreed upon between himself and the town treasurer, that he would accept the amount of the award, and open such street when the right of way over adjoining land was procured, and that such condition had not been complied with, are admissible against the plaintiff therein as an admission of the receipt of the money and the condition on which he held it, in a subsequent action by him for trespass for destroying his fences on such land after the right of way over the adjoining land had been procured.

MUNICIPAL CORPORATION.—Nunc Pro Tunc Entry.—Report of Assessment of Benefits and Damages.—A town may order the entry *nunc pro tunc* of the report of assessors of benefits and damages caused the property of a designated person by the opening of a street, which has been inadvertently omitted from the records.

ESTOPPEL.—Reception and Retention of Award in Condemnation Proceedings.—The reception and retention of an award in condemnation proceedings estop the landholder to deny the validity of the proceedings.

HARMLESS ERROR.—Evidence.—Admission of evidence upon which the rights of the parties do not in any manner depend, if erroneous, is not available error.

From the Henry Circuit Court.

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J. Brown and W. A. Brown, for appellant.

M. E. Forkner, for appellees.

HACKNEY, C. J.—Joshua Holland, whose administratrix has been substituted as appellant herein, sued the appellee and two others in trespass for breaking down certain fences. The appellee, with his co-defendants, in addition to the general denial, justified the acts complained of as having been committed by Spell, as the marshal of the town of New Castle, pursuant to an order of the board of trustees of said town and by virtue of certain condemnation proceedings, wherein that part of the enclosure included within the fences destroyed was condemned for a public street, and the plaintiff's damages were assessed and paid to him, and he accepted the same upon the condition that the town would "first acquire the right-of-way for said street through the property adjoining his property immediately upon the east before opening said street." It was alleged also that the said property adjoining had been so acquired. The trial resulted in a judgment for the appellee and his co-defendants. The error assigned in this court is the overruling of a motion for a new trial.

The principal contention arises upon the question, was the finding of the lower court contrary to law? The facts were that in 1877 Holland owned the tract in question, which was separated from a terminus of Vine street in said town by one other tract; proceedings were had to condemn a right-of-way for the extension of said street through said two tracts; the regularity of such proceedings is not questioned back of the reception, by the town board, of the report and assessment of commissioners, in and by which report \$50.00 were awarded as Holland's damages. At this point in the proceedings said report was laid upon the

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table, by the action of the board, and no further action appears of record at that time. At a later period, the date of which is not disclosed, the record showed an entry, *nunc pro tunc*, in the proceedings of said board as follows: "Opening Vine street. On motion the following action was taken by the board in the matter of opening Vine street. It appearing to the satisfaction of the board that at the meeting of the board of trustees of this town, on the 18th day of October, 1877, the report of the assessors of benefits and damages in the matter of the opening of Vine street through the property of Joshua Holland, in said town, was duly accepted by the board and the treasurer of said town ordered to pay the damages assessed to him therein, and that said order was by inadvertence of the clerk of said town omitted from the records. It is now ordered that the following order be and the same is now entered of record, now for then: 'On motion it is ordered that the report of the assessors of benefits and damages in respect to the opening of Vine street through the property of Joshua Holland and others, heretofore filed, be and the same is hereby accepted and the treasurer of the town is ordered to pay Joshua Holland the sum of \$50.00, the damages assessed to him.'" After the report of the commissioners the treasurer paid to Holland said sum of \$50.00, he, said Holland, accepting said sum upon the expressed conditions, by him stated, that he would open the street through his tract when it should be opened through said adjoining tract. The sum so paid to and received by Holland was ever after retained by him. After some litigation with the owner of the adjoining tract, and in 1892, the town acquired, by purchase, a right-of-way for the extension of said street through said adjoining tract and thereupon notified Holland to open the street through his tract. Failing

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to observe this notice the board ordered Spell, the marshal, to open the street through said tract, and it was in obedience to this order that he did the acts alleged to constitute the trespass.

The appellant's learned counsel devote most of their argument to the proposition that the receipt and retention of the money by Holland upon the oral promise to devote his real estate to the uses of a street did not constitute an enforceable contract and did not estop him to deny the right of entry by the town authorities under such contract.

We apprehend that any rights of the town do not arise upon contract, but must depend upon the condemnation proceedings, such proceedings being valid or Holland being estopped to deny their validity. It is a general rule that where benefits are awarded to the owner of land in proceedings to condemn, an acceptance of the sum awarded will preclude the owner from prosecuting an appeal. Elliott App. Proced., section 150; *People, ex rel., v. Mills*, 109 N. Y. 69; *Felch v. Gilman*, 22 Vt. 38; *Hailey v. Harrall*, 19 Conn. 142; Elliott Roads and Streets, 277. Judge Elliott says, in his App. Proced., section 151: "It will be observed that in the cases in which it has been held that an estoppel exists, the act necessarily affirmed the validity of the judgment. Thus, where a party accepts money or property awarded him by a judgment, he concedes the validity of the judgment, since it is by virtue of the judgment that he obtains the money or property." These principles have been applied by this court in proceedings similar to those involved in the present case. *Test v. Larsh*, 76 Ind. 452; *Baltimore, etc., R. Co. v. Johnson*, 84 Ind. 420; *Newman v. Kiser*, 128 Ind. 258.

In *Byer v. Town of New Castle*, 124 Ind. 86, the doctrine that one may estop himself to deny the validity of

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condemnation proceedings was recognized. That he may estop himself, by the receipt of the money awarded in condemnation proceedings, to deny the validity of the proceedings was held in a full and satisfactory opinion and citation of authority in *Test v. Larsh, supra*. We can conceive of no good reason why he should, in good conscience, be permitted to receive all the benefits of the proceeding, and, while holding them, deny that the proceeding is effectual to create the burdens corresponding to such benefits. In this view of the question we regard it as unnecessary to consider whether Holland had notice of the intention to enter or of the entry of the proceedings *nunc pro tunc*. Nor can it be material as to the time when such entry was made. Without the entry we should regard him as estopped to question the validity of the proceeding so long as he held the money to which he had no color of claim except by the presumption that the proceedings were regular. That the town had the power, however, and that we must presume in favor of its proper exercise, in the matter of its entry *nunc pro tunc* in such proceedings, has been decided. *Chamberlain v. City of Evansville*, 77 Ind. 542, and cases there cited. See also *Byer v. Town of New Castle, supra*, where such power was recognized.

Complaint is made, also, of the admission in evidence of such *nunc pro tunc* entry. As we have said, the rights of the parties did not depend upon that entry and were correctly decided without reference to it, and if by any possible reason its admission in evidence was erroneous, it was not an available error. It is urged also that the court erred in admitting in evidence the papers and decree in an injunction proceeding instituted and prosecuted by Holland against the town of New Castle and David Harvey, its then marshal. That proceeding was to enjoin the entry of

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Holland's tract for the extension of said Vine street in 1884. One answer in that case was the condemnation proceedings and the payment to Holland of the \$50.00. Holland replied, among other facts, that it was agreed between himself and the treasurer, who paid him the \$50.00, that he would accept the same "and open said street and give possession thereof when the board of trustees procured the right-of-way and opened said street through the lands * * adjoining * * on the east," and alleging that the condition had not been complied with on the part of the town. The decree enjoined the opening of the street, upon the theory of this reply, "until said defendant shall have first obtained a right-of-way * * through and across the lands * * adjoining," etc. These papers were admissible, not as a former adjudication, but as Holland's solemn admission of the receipt of said money and of the condition upon which he held it, and, at the same time, why he denied the right to occupy his land for the street. It was not mere hearsay evidence; it was the admission of the party, and one upon which he procured a decree in the court in which he now asks relief upon an inconsistent ground.

It is further urged that the trial court erred in admitting in evidence the notes of the judge who tried said injunction suit as to the evidence of Holland upon that trial to the theory of said reply. That theory was not questioned by Holland upon this trial, and besides the admission of said reply there was the evidence of the treasurer who made the payment. Such evidence, uncontradicted, would have established the proposition involved without regard to the notes. There was, however, a *prima facie* showing that such notes were the best evidence attainable. In view of the first conclusion of this opinion, we are convinced that the case was properly decided upon its

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merits, and that any possible error in the introduction of the evidence so complained of cannot be made available.

The judgment of the circuit court is affirmed.

Filed February 12, 1896. Petition for rehearing overruled April 16, 1896.

NOTE.—The authorities as to the entry of a judgment *nunc pro tunc* are found in a note to *O'Sullivan v. People* (Ill.), 20 L. R. A. 148.

No. 17,619.

MYERS v. CITY OF JEFFERSONVILLE ET AL.

APPELLATE PROCEDURE.—*Dismissal.—Failure to File Brief.*—An appeal will be dismissed by the Supreme Court, where the appellant has expressly declined to file a brief, in the absence of a request by the appellee that the cause be passed upon by the court, under rule 20, of the court.

From the Clark Circuit Court.

J. E. Taggart, for appellant.

L. A. Douglass, for appellees.

MCCABE, J.—This was a suit brought by the appellant against the appellees, mayor and common council of said city, to enjoin the issuing and selling certain bonds of said city. The circuit court overruled a demurrer to an affirmative answer by the appellees, and the plaintiff, appellant, refusing to plead further, and standing by his demurrer, the defendants, appellees, had judgment that appellant take nothing by his suit.

The appellant has assigned that ruling as error. He has filed no brief, and has expressly declined to do

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so by filing a paper in which he says, "The appellant hereby waives the filing of a brief in the above case, and requests that the case may be decided upon the appellees' brief." The appellees alone have filed a brief, but they have filed no written request that the cause be passed upon by this court. Rule 20 of this court requires the appellant to file a brief within a certain specified time after the cause is submitted, in default of which the clerk is required to enter an order dismissing the appeal, unless the appellees shall have filed with the clerk a written request that the cause be passed upon by the court. As before observed, this has not been done.

It has often been decided by this court that the failure by the appellant to brief an error assigned is a waiver of such error.

The express declination of the appellant to file a brief is a waiver of the error he has assigned. The appellees have no legal right in the absence of the rule mentioned to require this court to decide the error assigned by the appellant, because the appellees have got all they asked for in the trial court. But they could have procured the decision of the question presented by the assignment of error by complying with the rule.

The error assigned having been waived, the appeal is dismissed.

Filed May 28, 1895; petition for rehearing overruled April 16, 1896.

Robb v. The State.

No. 17,770.

ROBB v. THE STATE.

APPELLATE PROCEDURE.—*Conflicting Evidence.*—The Supreme Court will not pass upon conflicting evidence.

SAME.—*Misconduct of Prosecuting Attorney.*—Alleged misconduct of the prosecuting attorney, in his opening statement to the jury, will not be considered on appeal, where exceptions were saved only to the several statements, but no request was made to withdraw the submission and set aside the panel, or to direct the jury to disregard the statements.

SAME.—*Instruction.*—*Presumption.*—*Misconduct of Counsel.*—The Appellate Court will presume that the court, in its charge, withdrew any misstatements of a prejudicial character by the prosecuting attorney in his opening address and directed the jury to ignore them, where there is no proper authentication that all the instructions given are embraced in the transcript.

SAME.—*Matters Stated in Motion for New Trial.*—*When Taken as True.*—Matters stated in a motion for a new trial will not be taken as true upon appeal, unless established by a bill of exceptions, although they appear in what purports to be the longhand copy of the stenographer's report, which is in no way certified, made a part of the motion.

From the Boone Circuit Court.

T. Hanna, I. N. Bradwell and R. W. Harrison, for appellant.

W. A. Ketcham, Attorney-General, for State.

HACKNEY, C. J.—The appellant, Charles E. Robb, was charged, by indictment, with the crime of murder in the first degree, in the killing of Eli Wilson. Upon the trial he was convicted of manslaughter and was sentenced to imprisonment in the State's prison for fifteen years. The questions presented in this court

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149	412
151	497
151	501
151	514
151	661

144	569
154	355

144	569
160	423

144	569
163	623

144	569
165	473

144	569
167	234
167	374
168	435

144	569
169	508
169	563

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arise upon the action of the lower court in overruling the appellant's motion for a new trial.

While conceding that it is contrary to the established practice for this court to pass upon conflicts in the evidence, it is insisted that we should do so in this case. We have looked into the evidence sufficiently to assure ourselves that there was evidence which, if without conflict, would support the conviction. It appears, without conflict, that the deceased was a tenant of the appellant, occupying a part of the house occupied by the appellant; that he became indebted for rents, and when called upon to pay urged his inability to do so; that some hot words ensued, and that the appellant went into his part of the house, procured his two pistols and returned to the back lot and shot and killed Wilson, who was standing in, or upon the inside and near, the back door of his part of the house. The essential point of conflict in the evidence was as to whether, at the instant of the shooting, Wilson had in his hand, in a threatening attitude, some instrument resembling a pistol and which Robb believed to imperil his life. There was evidence against the theory of Wilson's possession of any such instrument, and which, standing alone, would have supported the conclusion that when Robb returned with the pistols Wilson was not offering, by word or action, any violence towards Robb, but was standing inside and near the door in the act of taking a tin cup of drinking water from a bucket upon a small table when Robb fired the fatal shot. We would certainly usurp the exclusive function of the jury should we attempt to review their conclusion upon this conflict. *Deal v. State*, 140 Ind. 354, and cases there cited.

The motion for a new trial contained a number of specifications or causes of error, alleged to consist in the misconduct of the prosecuting attorney in his

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opening statement to the jury and in his closing argument of the cause. Of the specifications involving the statements made in the preliminary statement, three in number, the bill of exceptions discloses an exception to each of said several statements, but does not disclose any request to the court to withdraw the submission and set aside the panel or to direct the jury to disregard the statements. In *Coleman v. State*, 111 Ind. 563, this court said that: "In the case under consideration the objectionable remarks of the prosecutor were made immediately after the jury were impaneled, at the very outset of the trial. If the court had, of its own motion, set aside the submission and discharged the jury without the appellant's consent, jeopardy having attached, it might well have been claimed that he was entitled to an acquittal. To have made available error, the trial court should have been afforded an opportunity to eliminate the error, by ruling upon a motion to arrest the further progress of the case. True, there was an objection and an exception to the statement of the prosecutor, but the court sustained the objection, and under its ruling the objectionable statement was withdrawn. There was, therefore, no ruling or decision of the court to which an exception was or could have been saved. Section 1845, R. S. 1881. Our conclusion, therefore, is that, in the absence of a motion by the defendant to set aside the submission and discharge the jury, there was no available error in refusing the motion for a new trial on account of the alleged misconduct of the prosecuting attorney in his opening statement." See also *Reed v. State*, 141 Ind. 116. In the present case it was the privilege of the appellant to have invited and insisted upon some action of the trial court, with reference to the alleged misconduct, and to have based his exception upon the court's ruling. Without doing

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so he occupies the position of the complaining party in the case from which we have first quoted, namely: of taking an exception to the conduct of the attorney and not to any ruling of the court. However, it is the duty of this court to indulge all reasonable presumptions in favor of the action of the trial court, and in doing so in this instance we must presume, the contrary not appearing, that the court in its charges to the jury withdrew any misstatements, of a prejudicial character, and directed the jurors to ignore them. The bill of exceptions affirmatively discloses that no ruling was made by the court and that no instructions were given concerning this question "except as is set out in its final instructions to the jury." That there was some direction to the jury upon the subject is not only presumed, but that presumption is supported by this statement of the court. The instructions given are not in the record by bill of exceptions, and form no proper part of the transcript. There are at the close of the transcript and after the usual certificate of the clerk, what purport to be instructions given to the jury, but we are not advised by any proper authentication that they were all that were given. We cannot, for these reasons, look to them to determine whether the court did withdraw the statements so excepted to.

Objection is made also to a number of statements and arguments of the prosecutor in his closing argument, which statements are not supported by a bill of exceptions. It has been many times decided that matters stated in a motion for a new trial are not taken as true unless they are established by a bill of exceptions. *Reed v. State, supra; Heltonville Mfg. Co. v. Fields*, 138 Ind. 58. It is true that counsel made a part of the motion what purports to be the long-hand copy of the stenographer's report of the prosecutor's argument, but we know of no rule of practice,

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and certainly of no statute which makes the stenographer's report, in no way certified by the judge, a substitute for a bill of exceptions. It does not do so even with relation to the evidence taken in the cause, and much less so as to the truth of matters contained in a motion for a new trial. If the reports should be accepted as carrying the force of an affidavit of the stenographer in support of the facts contained in the motion for a new trial it would, nevertheless, require a bill of exceptions to bring it into the record.

Other questions are suggested by counsel for appellant, but they are controlled by what we have already said in passing upon the questions above considered.

Finding no available error in the record, the judgment of the lower court is affirmed.

Filed April 17, 1896.

No. 17,777.

MOORES v. HARE ET AL.

WILL.—*Devise of Real Estate.—Life Estate.—Remainder.*—A clause in a will devising to testator's daughter certain real estate "for and during her natural life as a life-estate, and not in fee, at her death to go to her children in fee simple. If any child of hers shall have died leaving a child or children, then the portion of said real estate, that would have gone to the parent, shall go to such child or children,"—vests in the children of such daughter an estate in remainder, which takes effect immediately upon the death of the testator, the enjoyment thereof being postponed until after the death of their mother.

From the Marion Circuit Court.

M. Moores, for appellant.

E. E. Stevenson, for appellees.

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166	453
166	454
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171	384

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MONKS, J.—Appellant brought this action against appellees to quiet title to certain real estate. The complaint alleges “that on March 17, 1882, Stoughton A. Fletcher died, leaving a will which contained the following provision: ‘I give and devise to my daughter, Maria F. Ritzinger, for and during her natural life, as a life-estate and not in fee, the following real estate: Lot number seven (7) in West’s Heirs’ addition to the city of Indianapolis, in Marion county, Indiana,’ and other land. ‘At the death of her, said Maria F. Ritzinger, all the said real estate so devised to her for life shall go to her children in fee simple. If any child of hers shall have died, leaving a child or children, then the portion of said real estate that would have gone to the parent shall go to such child or children.’

“That at the time of the probating of the will, Maria F. Ritzinger was a widow and unmarried, and is still unmarried, and that she had then four children, of whom one has since died intestate, unmarried and without children or their descendants, the other three being now of age, two of them being married, one being the mother of the defendants, Myla F. and Julia F. Briggs, and the other the mother of the defendant, Helen Hare; that Maria F. Ritzinger, and all of her children, with the husbands of the two that are married, have united in conveying to plaintiff the property the title to which is sought to be quieted. And plaintiff asks that his title to this property be quieted as to the defendants, who are grandchildren of Maria F. Ritzinger.”

To this complaint appellees filed a demurrer, which was sustained by the court, and appellant refusing to plead further, judgment was rendered in favor of appellees.

The only question presented is whether that portion

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of the will giving Maria F. Ritzinger a life-estate in certain lands created a vested or contingent remainder in her children. It is settled law that words of survivorship in a will, unless there is a manifest intent to the contrary, always relate to the death of the testator, and that in the absence of contrary intent a will always speaks as from the testator's death. *Heilman v. Heilman*, 129 Ind. 59 (63, 64), and cases cited; *Harris v. Carpenter*, 109 Ind. 540; *Hoover v. Hoover*, 116 Ind. 498; *Wright v. Charley*, 129 Ind. 257, and cases cited.

It is an established rule that the law not only favors the vesting of remainders, but it also presumes that words postponing the estate relate to the beginning of the enjoyment of the remainder and not to the vesting of such estate. In the absence of a clear manifestation of the intention of the testator to the contrary, an estate will be held to vest at the earliest possible period. The intent to postpone must be clear and manifest and must not arise by mere inference or construction. *Davidson v. Koehler*, 76 Ind. 398 (409, 410); *Hoover v. Hoover*, *supra*; *Amos v. Amos*, 117 Ind. 37; *Harris v. Carpenter*, *supra*; *Borgner v. Brown*, 133 Ind. 391, and cases cited. *Bruce v. Bissell*, 119 Ind. 525 (529, 530); *Wright v. Charley*, *supra*; *Fowler v. Duhme*, 143 Ind. 248, and cases cited.

In *Harris v. Carpenter*, *supra*, the will gave to the testator's wife certain real estate during her life, and provided that "at her death the same shall be the property of and pass to my daughter, Laura Carpenter, in fee; but if the said Laura be not living, then to her heirs forever." This court held that the survivorship provided for in the last clause had reference to the time of the death of the testator, and that upon his death Mrs. Carpenter became seized of a vested remainder in fee.

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In *Hoover v. Hoover, supra*, the testator devised to his wife certain real estate during life and provided that at her death the undivided one-half thereof should "pass in fee simple to my son, Andrew Hoover, if he be then living, and if he be dead, then to his widow until her death or marriage, and at her death or marriage, then to go to his heirs, and if no heirs be living, then said lands shall pass to the heirs of Daniel Hoover, the testator." This court held that Andrew Hoover took an estate in fee simple, in remainder which vested immediately upon the death of the testator, but which he could only enjoy in possession after the termination of the life-estate of his mother.

In *Heilman v. Heilman, supra*, the testator gave to his wife the residue of his real estate and personal property during her natural life, and so long as she remained unmarried, and provided that after her death, that the same should "be divided in equal shares among all my children, and should any of my children be dead and have left children then they shall be entitled to the distributive share of their parents."

This court held that the children of the testator took a vested interest in the part of the estate covered by this clause, at the time of the death of the testator, the enjoyment of which was postponed during the life of the widow.

In *Borgner v. Brown, supra*, the language of the part of the will in controversy was as follows: "I devise to my wife the farm during her natural life; at the death of my wife the real estate aforesaid, I devise to my son James (Helms). If James should die without issue, the above real estate to descend to his wife if living and the remainder to go to his children."

James Helms died before the testator. This court held that James Helms, if he had survived the testator, would have taken a fee in said lands immediately

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upon the death of the testator, subject to the life-estate of his mother. That said James having died before the death of the testator, his, James', widow took under the will one-third of said real estate in fee simple subject to the life-estate of the testator's widow, and the remaining two-thirds to the testator's children, subject to said life-estate.

In *Tindall v. Miller*, 143 Ind. 337, the clause of the will in controversy was as follows: " 'I give and bequeath to my beloved wife, Sarah, the east half of my present dwelling house and lot (describing the property) so long as she may live. * * * And at the death of my said wife the above described property shall pass absolute to my daughter, Julia, if she still survive. If she shall be deceased, it is my desire that the property do pass to her heirs.' " Both the wife Sarah and daughter Julia survived the testator. After the death of the testator the devisees, Sarah and Julia, sold and conveyed the property devised by deed duly executed. After which they both died before the commencement of the action, the daughter dying before her mother, leaving heirs. This court held that the daughter Julia took a vested remainder, the enjoyment of which was postponed until the death of her mother, the life tenant, and that the deed of herself and mother passed to the grantees a perfect title in fee simple.

These cases are similar to the case before us, and we think this case must be ruled by them.

There being no manifest intent to the contrary, it will be presumed that the clause providing that at the death of Maria F. Ritzinger the real estate devised should go to her children in fee simple relates to the beginning of the enjoyment of the remainder, and not to the vesting of that estate, and that the clause,

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"If any child of his shall have died leaving a child or children," has reference to death during the life time of the testator. Under the rules which we have stated and authorities cited, we think it is clear that the children of Mrs. Ritzinger took a remainder in said real estate which vested immediately on the death of the testator, the enjoyment of which was postponed until the death of their mother.

It follows that the court erred in sustaining the demurrer to the complaint.

Judgment reversed, with instructions to overrule the demurrer to the complaint and for further proceedings in accordance with this opinion.

Filed April 17, 1896.

No. 16,879.

COFFIN ET AL. v. THE STATE.

DAMAGES.—Breach of Contract.—Sale of State Bonds.—Resale.—

Damages for the breach of a contract for the sale of bonds do not include the profit lost by inability, by reason of the breach, to fulfill a contract for the resale of the bonds at an advance, in the absence of any notice to or knowledge by the party in default of the contemplated resale, but the measure of damages is the increase in the market value of the bonds at the time of such breach.

APPELLATE PROCEDURE.—Nominal Damages.—Failure to Assess.—

Reversal.—The failure to assess nominal damages for breach of a contract, is not an error that affects the substantial rights of appellants, entitling them to a reversal.

From the Marion Superior Court.

C. Martindale, for appellants.

W. A. Ketcham, Attorney-General, for State.

144	578
164	430

144	578
171	527

Coffin et al. v. The State.

MCCABE, J.—The appellants, as partners in the banking business under the firm name and style of Coffin & Stanton, sued the State of Indiana to recover damages for the breach of the following alleged contract, namely:

“OFFICE OF S. P. SHEERIN & Co.,
“BROKERS AND APPRAISERS OF REALTY.

“INDIANAPOLIS, IND., March 17, 1887.

“To the Governor, Treasurer and Auditor of State,
Indianapolis, Ind.:

“Gentlemen—We will take your proposed State loan of \$330,000 to run five years, and to be redeemable at the pleasure of the State in two years, for which we will take the bonds of the State at par bearing three and three-tenths (3 3-10) per centum interest, payable semi-annually; principal and interest payable in New York.

. Respectfully submitted,

“COFFIN & STANTON,
“By S. P. SHEERIN.”

“INDIANAPOLIS, IND., March 17, 1887.

“The above proposition, \$330,000, 3 3-10 *per centum*, is hereby accepted.

“ISAAC P. GRAY, Governor,
“J. A. LEMCKE, Treasurer of State,
“BRUCE CARR, Auditor of State.”

The damages claimed as arising out of the alleged breach of the above contract and the breach thereof are alleged as follows: “That in pursuance of said contract and acting upon said contract, the plaintiffs immediately resold said bonds in the State of New York, at a figure which would net these plaintiffs the sum of * * * \$3,564.00; that, thereafter, the said State officers * * * did, on the 21st day of March,

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1887, notify the said plaintiffs that they would not perform the contract * * *; that the State of Indiana has failed to perform its contract * * as aforesaid * * and still fails and refuses to perform the same though plaintiffs have stood ready and have offered to perform their part of said contract.”

The superior court overruled a demurrer to the complaint, and the issues formed thereon were tried by the court, resulting in a general finding for the defendant, upon which judgment was rendered over the plaintiffs’ motion for a new trial. The action of the court in overruling the later motion is the only error assigned; and the only ground or reason assigned in the motion for a new trial is that the decision is not sustained by and is contrary to the law and the evidence. It is not claimed that the evidence makes any better case than the complaint.

The natural presumption arising from the facts stated in the complaint, aside from the special circumstances of the alleged resale of the bonds by the plaintiffs before they got them at a profit of \$3,564.00, was that the bonds were worth the money which was to be paid for them, and the money was worth the bonds. Where the goods are contracted for, as was the case here, to be paid for on delivery, the measure of damages for non-delivery is the difference between the market value of the goods and the contract price at the time fixed for delivery. *Frink v. Tatman*, 36 Ind. 259; *Beard v. Sloan*, 38 Ind. 128; *Vickery v. McCormick*, 117 Ind. 594. Therefore, if between the date of the contract and the time fixed for delivery or the breach of the contract there was no change in the market value of the bonds, the defendant could be held liable only for nominal damages. *Rosenbaum v. McThomas*, 34 Ind. 331.

There is no allegation in the complaint, and it is not

claimed, that there is any showing in the evidence that there had been any increase in the market value of the bonds between the date of the contract, March 17, and the date of its breach, the 21st day of the same month. Therefore, for aught that is shown outside of the alleged special resale of the bonds by them, the plaintiffs' money in their pocket is worth as much as the bonds, and therefore they are not damaged by the failure to get it exchanged for something of no more value than their money, which they still retain.

It remains to be determined whether the proof of the allegation that the plaintiffs, acting upon said contract, immediately resold said bonds in the State of New York at a net profit of \$3,564.00, affords any ground for recovery of that or any other sum as damages for the breach of the alleged contract. The natural presumption would arise from the written instrument itself, that plaintiffs were buying the bonds for the profit to be derived from the semi-annual interest at the rate of 3 3-10 per centum thereon. Under such circumstances both parties to the contract would have full notice that the market value of the bonds would be the measure of damages.

There is no allegation in the complaint that the defendant or her agents had any notice or knowledge of the contemplated resale of the bonds by the plaintiffs. The rule in such cases is stated in 5 Am. and Eng. Ency. of Law, 13-14, thus: "The liability for a breach of contract is less extensive than that for a tort; involving only such consequences as were the direct result of the breach, and were within the contemplation of the parties at the time of the formation of the contract.

"(a) *Hadley v. Baxendale*, the leading English case on this subject, and one followed by the American

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courts, has been considered to lay down the following rules as to damages for the breach of contract: 'First, that damages which may fairly and reasonably be considered as naturally arising from a breach of contract, according to the usual course of things, are always recoverable.' Among such are losses caused by the loss of a season, the fall of the market, any increased expense caused the plaintiff by the breach, or substantial inconvenience from that cause. * *

"Damages arising out of the usual course, but from peculiar circumstances, are too remote, unless the special circumstances were known to the defendant at the time of the breach."

Parties to the contract are not supposed to know more of one another's affairs than may be communicated to them, nor to consider existing or contemplated transactions with other persons unless these are made known to them. Hence the losses on collateral engagements depending on the fulfillment of the principal contract are too remote to be considered in estimating the damages for the breach of the principal contract. *Lawrence v. Wardwell*, 6 Barb. (N. Y.) 423; *Harper v. Miller*, 27 Ind. 277; 5 Am. and Eng. Ency. of Law, 15, and authorities cited in note. To the same effect is Sedgwick on Damages (6th ed.), page 79, and authorities there cited. *Vickery v. McCormick*, *supra*, in effect, holds the same thing. It follows from what we have said that the most the appellants were entitled to recover was mere nominal damages.

The failure to assess nominal damages is not an error that affects the substantial rights of appellants. *Patton v. Hamilton*, 12 Ind. 256; *Hacker v. Blake*, 17 Ind. 97; *Black v. Coan*, 48 Ind. 385; *Mahoney v. Robbins*, 49 Ind. 146; *Wimberg v. Schwegeman*, 97 Ind. 528.

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The superior court, therefore, did not err in overruling appellants' motion for a new trial.
Judgment affirmed.
Filed April 17, 1896.

No. 17,199.

BOARD OF COMMISSIONERS OF HUNTINGTON CO. v.
HEASTON.

CONTRACT.—*Implied Assumpsit.*—*Money Paid County Auditor on Unlawful Claims.*—An action will lie in favor of a county against a county auditor to recover money ordered paid to and received by him upon an unlawful claim.
COUNTY COMMISSIONERS.—*Allowing Unlawful Claim.*—*County Not Liable.*—The board of county commissioners cannot bind the county by allowing and ordering to be paid an unlawful claim.
SAME.—*Allowance an Administrative Act.*—*Res Adjudicata.*—The allowance of a claim against a county by the board of county commissioners, is an act by it in its administrative capacity, and is not conclusive as a judicial determination, under section 7830, R. S. 1894, making it a duty of such board to "allow all amounts chargeable" against the county.
EVIDENCE.—*Burden of Proof.*—*County.*—*Recovery of Illegal Claim Ordered Paid.*—The burden is on the county, in an action to recover a claim ordered paid by the board of county commissioners, to show that the claim was not a legal charge against the county.
PAYMENT.—*County.*—*Illegal Claim.*—Payment, under an allowance of claims made by the board of county commissioners in defiance of a positive statute, is not a payment by the county, within the rule that a payment under mistake of law cannot be recovered.
MAXIM.—*Judge.*—No one can be a judge in his own case.

144	583
142	682
147	494
144	583
148	471
150	622
152	505
144	583
154	546
155	159
156	457
144	583
157	453
157	454
144	583
158	156
158	534
158	537
144	583
159	510
159	582
144	583
161	562
144	583
163	234
163	416
144	583
165	104
165	107
144	583
167	12
168	537
144	583
169	171

From the Huntington Circuit Court.
L. T. Milligan, O. W. Whitelock, S. E. Cook, B. K. Elliott and W. F. Elliott, for appellant.
Spencer & Branyan, Kenner & Lesh and A. C. Harris, for appellee.

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JORDAN, J.—This was an action against the appellee, by the appellant, the board of commissioners of Huntington county, to recover of the former the sum of \$7,221.90, alleged to have been allowed him as auditor of said county by its commissioners in violation of the statutes. Upon a trial had there was a judgment rendered in effect that the appellant take nothing by the action, and that appellee recover his cost, and to reverse this judgment appellant prosecutes this appeal. The complaint alleges substantially the following facts:

That the appellee, Heaston, was elected and served as auditor of Huntington county, from the 1st day of November, 1887, to November 1, 1891; that he was paid and received for said term as such officer all salary and compensation allowed by law; that during his term, notwithstanding the fact that he had been paid and received from the county all of his salary and compensation allowed him by law, he, under the color of said office, illegally taxed up fees, and in violation of law demanded, extorted, and received payment of the same, in his official capacity, from the county; the said fees not being allowable under the statutes of the State. Here follows an itemized list of fees so taxed and received by appellee from the county, amounting in the aggregate to \$7,221.90, for which judgment is demanded. This schedule filed as an exhibit, and made a part of the complaint, shows among other things certain sums of money received by the appellee from the county arising out of fees taxed and charged by him in highway cases, gravel-road matters, and ditch proceedings before the board of commissioners, and for filing papers in his office, etc. A demurrer being overruled to the complaint, appellee then filed an answer in two paragraphs, the first of which was a denial. By the second paragraph, he ad-

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mitted that he had received the sums of money as charged in the complaint, but averred the facts that he presented the claims in an itemized and verified account, as due and owing to him by the county, to its board of commissioners while in legal session for the transaction of business, and that the said board allowed the same against the county, and by an order of record directed that the money be paid out of the county treasury, and that it was so paid to him upon a warrant drawn upon the treasurer thereof.

He further alleges therein that the claims were allowed and the money paid to him in good faith, and that the orders of the board allowing the same were not appealed from, and are in full force and effect, and that the sums of money so allowed and paid to him are the identical ones and upon the same accounts described in the complaint, and for which a recovery is sought, and that said orders, or judgments, so made and entered by the board of commissioners were a full, final, and complete adjudication of all the matters alleged in the complaint between the same identical parties herein, and that plaintiff is thereby estopped from recovering anything in this action.

A demurrer to this paragraph for insufficiency of facts was overruled and excepted to, and the plaintiff was ruled to reply.

The action of the court in overruling the demurrer to this paragraph of the answer is the first error assigned and presented by the appellant, and is virtually treated as the chief question for the consideration of this court.

The contentions of the learned attorneys for appellant are, in the main, that these allowances were made by the county commissioners in defiance of law; that the latter were guilty of a crime in so doing; that appellee received the county's money and converted

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the same to his own use without authority of law, and that the county is not bound by this unauthorized or forbidden act, nor precluded from recovering the money back from the appellee, and among their citations they refer to section 2105, R. S. 1894 (section 2018, R. S. 1881), and sections 6543, 6544, 6548, 6549, R. S. 1894. The latter being sections 2, 3, 7 and 8 of an act in force June 5, 1883. Acts of 1883, page 48. Also section 7853, R. S. 1894 (section 5766, R. S. 1881). They further insist that conceding that the commissioners allowed the claims to appellee, as he alleges, however, in doing so they acted in their administrative or ministerial capacity, and not as a court, and that the principle of *res adjudicata* does not apply, and the county is not estopped to inquire into the illegality of these allowances.

They further contend that conceding that they acted in the matter as a court, the claims allowed were forbidden by law; and hence there was an absence of jurisdiction. While upon the side of appellee, his learned counsel contend that in allowing these claims in the manner and form as shown by this paragraph of the answer, the board of commissioners of Huntington county acted as a court, and in passing upon and allowing these claims in favor of appellee, it exercised its judicial powers, and that it had jurisdiction in the premises, and that its judgments rendered under the alleged facts are valid and a complete bar and estoppel against the county. They also insist that the board having the power to judicially act and decide in the matter, its judgments, right or wrong, are binding upon the county, and cannot be collaterally called in question.

The contentions and argument of appellee's counsel from their standpoint are to some extent supported by authorities cited, among which are de-

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cisions of this court. The manifest theory of the cause of defense, as outlined by the facts alleged in this answer, is that of *res judicata*. It is a confession of appellant's cause of action, but seeks to avoid it upon the ground that the claims mentioned in the complaint have been adjudicated between the parties in the commissioners' court, and that appellant is thereby estopped from contradicting in this action the verity and binding force of the alleged judgment rendered.

The trial court, in overruling the demurrer to this answer, in effect, adjudged that the facts therein averred were sufficient to constitute this defense. Boards of commissioners, under the law, in the discharge of their duties have, at least, a dual character. In some respects they act judicially, and the law regards them as a court, and from their decision an appeal lies in this State under section 5772, R. S. 1881 (section 7859, R. S. 1894), by a party aggrieved, to a higher court. In other respects they act in an administrative capacity, as the representative of the county. See section 197, Elliott Gen. Prac., and cases there cited. When they rightfully exercise their powers as a court, it is settled by the authorities that they are to be treated as such, and their judgments rendered, or orders made, cannot be collaterally impeached, and the principles of former adjudication are applicable thereto. But if, upon the contrary, the commissioners of Huntington county did not, under the law in allowing the claims of appellee, act as a court, but were simply in the discharge of administrative duties, and that the orders so made can be said to be but *quasi-judicial*, then, we think, it must follow, as a legal consequence, that the appellee cannot, by virtue of his defense alleged, shield himself from liability as against appellant's right to recover the money which he, as it

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is averred, has extorted and received in defiance of law. The next inquiry is: In what character did the commissioners act, and what functions were they discharging when they allowed the claims or demands of appellee, in controversy?

By section 7815, R. S. 1894 (section 5731, R. S. 1881), the board of commissioners seems to be created in the first place for "transacting county business." However, it is well settled that these boards have such other powers and duties, judicial and otherwise, as may be lodged in them by the legislature. Section 7830, R. S. 1894 (section 5745, R. S. 1881), prescribes their duties, among which are:

"2d. To allow all accounts chargeable against such county.

"4th. To perform all other duties that may be enjoined on them by any law of this State."

It is true, as we have said, that under this last provision in the discharge of duties enjoined upon them by statute, the commissioners, in many cases not necessary here to mention, act as a court, and their decisions are regarded as judgments, from which an appeal will lie under section 5772, *supra*, which grants appeals generally to the circuit court.

It is likewise true that when administrative duties are enjoined upon these boards by law, from their action thereon, no appeal can be taken unless especially authorized by statute. *Board, etc., v. Davis*, 136 Ind. 503 (22 L. R. A. 515).

The statute relative to the collection or allowance of claims against a county, has, in latter years, undergone some changes, and such a construction has been placed upon this procedure by the courts of the State that indicate a holding to the effect that, at least as the law now stands, the commissioners, in hearing the claims of a creditor of the county, do not act in their

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judicial capacity. By an act of 1879 provisions were made for the filing and allowance of claims.

The first section of that act, which is section 7845, R. S. 1894 (section 5758, R. S. 1881), provides:

“That any person or corporation having a ‘legal claim’ against any county, shall file it with the auditor to be presented by him to the board.”

Section 2 (section 7846, R. S. 1894, section 5759, R. S. 1881) requires the commissioners to examine into the merits of all claims so presented, and they may, in their discretion, allow the same in whole or in part.

Section 3 provides for an appeal to the circuit court, and section 4 provided that no court should have original jurisdiction of any claim against a county, except in the manner provided in the act. By an act of 1885 (Acts 1885, page 80), section 3 of the act of 1879 was amended and now exists as section 7856, R. S. 1894.

In the case of *Bass, etc., Works v. Board, etc.*, 115 Ind. 234, this legislation was reviewed, and it was there held, in effect, by this court, that under the law as it stood subsequent to the amendment of 1885, the presentation of the claim to the commissioners, in the first instance, was but a condition precedent to the claimant's right to institute a suit upon it in the circuit or superior court.

Mitchell, J., speaking for the court in that case, on page 239 of the opinion, said:

“After a good deal of hesitation we are constrained to the conclusion, that the purpose of the act as it now stands was to require claims against counties to be first presented to the respective boards of commissioners before bringing suit. This is to the end that a county shall not be involved in litigation which might be avoided by affording it the opportunity to dis-

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judicially. It may be said, however, that in view of the fact that at the time of the enactment of the statute in regard to filing claims, there existed a general right of appeal from all judicial decisions of the board under the section to which we have referred, but notwithstanding this fact the legislature did especially authorize an appeal from an order disallowing a claim in whole or in part, that fact might perhaps be accepted at least as evidence tending to show a legislative recognition that the act of the board in the matter of allowing claims was not judicial, and that therefore an appeal would not lie therefrom under the section authorizing appeals in general. This latter statute applies to decisions of the board which are of a judicial character, and is not applicable to those made in matters pertaining to its administrative or ministerial duties, and we must presume that the legislature recognized that fact. *Bunnell v. Board, etc.*, 124 Ind. 1. It is held by the following decisions that the allowance of a claim by a board of commissioners is not conclusive, but only *prima facie* evidence of its correctness, and in effect not *res adjudicata*. *Commissioners v. Keller*, 6 Kan. 510; *Board of Superv. v. Catlett's Exs.*, 86 Va. 158; *Albernathy v. Phifer*, 84 N. C. 711.

As bearing upon the question see also *Hunt v. State, ex rel.*, 93 Ind. 311; *Wolfe v. State, ex rel.*, 90 Ind. 16; *Bunnell v. Board, etc.*, *supra*, and *State, ex rel., v. Board, etc.*, 136 Ind. 207. Again, if we consider the question from another standpoint, we must reach the conclusion that the county is not estopped or precluded from calling in question the order of the board allowing the claims, for the reason that there is an absence of mutuality. One of the essential elements of an estoppel by judgment is that

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both litigants must be alike concluded by the judgment, or it cannot be set up as conclusive upon either. Freeman on Judgments, section 159. *Hunt v. State, ex rel., supra*, page 322 of the opinion.

Under the act of 1885, had the claim of appellee been disallowed in whole or in part, he had the option to either appeal; or institute an independent action against the county in the circuit court. In that event the decision of the board disallowing his claim could not have been pleaded against him as *res judicata* in his action in that court. If the order did not bind the appellee, then it can be said that mutuality was wanting, and under the rule just stated it could not bind the county. In any view, we think, it must be held that appellee cannot successfully interpose the defense set up in his answer to the alleged cause of action, and the court erred in overruling the demurrer thereto. Acting then as the representative or agency of the county, in allowing the claim in controversy, did the board bind the former by their action in awarding the appellee the money thereon, as charged, without warrant of law, and in defiance thereof? In their administrative capacity the commissioners exercise their powers as public or special agents and cannot exceed the authority conferred upon them by law, the latter is the letter of their agency. Within legal limits, or scope of their authority, their action in auditing, determining, and allowing the amount due to a creditor of the county, in the absence of fraud, or perhaps mistake, binds the latter. But they cannot bind the county by allowing and ordering a claim to be paid, not legally chargeable to it, or the allowance of which is prohibited by statute. They have not unlimited choice as to the objects to which the money of the public shall be applied. *Har-*

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ney v. *Indianapolis, etc., R. R. Co.*, 32 Ind. 244. See also *Shirk v. Pulaski Co.*, 4 Dill. 209; *People, ex rel., v. Supervisor*, 14 Mich. 336; *Board, etc., v. Ellis*, 59 N. Y. 620, and cases there cited. Am. and Eng. Ency. of Law, Vol. 4, p. 389.

In *Harney v. Indianapolis, etc., R. R. Co.*, *supra*, this court, by Worden, J., on page 246 of the opinion, said:

“The counties are corporations created for the purpose of convenient local municipal government, and possess only such powers as are conferred upon them by law. They act by a board of commissioners, whose authority is defined by statute. One of the powers conferred is to collect taxes levied upon the people and property within the county. In the disposition of the money thus collected into its general treasury, the board has not unlimited discretionary choice as to the objects upon which it shall be expended. It can only be applied to certain specified objects, and the building of railroads is not one of these objects, or necessary to carry into effect any of the purposes for which such corporations were created.”

A board of commissioners cannot illegally make an allowance under the guise of making the same for services voluntarily rendered or things voluntarily furnished. *Gemmill v. Arthur*, 125 Ind. 258. The case of *Board, etc., v. Ellis*, *supra*, was an action by Richmond county, in the State of New York, to recover of the defendant money allowed to him by the board of supervisors, upon accounts not legally chargeable to that county, and it was there held that the action could be successfully maintained. The rule preventing the recovery of money voluntarily paid has no application under the facts in this case. As charged in the complaint, the claims were allowed and the money paid, without any legal authority for so doing.

In view of the alleged facts these claims were not

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only allowed in violation of law, but they were presented by the appellee and the money of the county unlawfully received by him, and he is chargeable with knowledge of the illegal acts.

It was no payment by the county. The latter, as the principal, had no part in the payment. It could not, as a public corporation, be held to consent to the payment of, or expenditure of, the public money in defiance of law. Awarding to the appellee this money, under the alleged facts, was in a legal sense equivalent to an unlawful appropriation of the county's money to his own use by the aid of its board of commissioners. The allowance and payment of the money being unlawful, the commissioners did not act within the scope of their authority, and therefore did not bind the county. *Board, etc., v. Ellis, supra; Lee v. Board, etc.,* 124 Ind. 214. Independent of the right given by section 6549, R. S. 1894, to recover back the money upon the part of appellant, which statute the appellee mildly insists has no application to an action under the facts in this case, we are of the opinion, however, that a right of action exists in favor of appellant. If the appellee has received and has the money of the county, under such circumstances that in equity and good conscience he ought not to retain the same, and which *ex aequo et bono*, belongs to the county, an action for its recovery will lie in favor of the latter. *McFadden v. Wilson*, 96 Ind. 253 and 257, and authorities there cited.; *Lemans v. Wiley*, 92 Ind. 436. If, under the facts in the case at bar, we should place the construction on the law as contended for by appellee, then a way would be paved by which it would be rendered easy for any person, under the guise of a legal claimant against a county, through the aid of its commissioners, if the latter were inclined to close their eyes to legal prohibitions, to unlawfully

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obtain and appropriate to his own use the public money, and when called upon in a court of justice to account for the same, deny the right of the county's recovery upon the ground of *res judicata*. Such in reason is not the law. It is not essential in this appeal that we should examine the various claims alleged to have been unlawfully allowed to appellee in order to determine their validity.

Without deciding, we may here, however, suggest that we recognize certain items in the claims allowed that were not legally chargeable to the county, and as the judgment must be reversed, we must presume that upon another trial the lower court, under the issue and the law, will properly adjudge whether a part or the whole of the claims in controversy were illegally allowed and paid to appellee, and award judgment accordingly.

As we have held that the order of the commissioners allowing the claims are, at least, *prima facie* evidence of their correctness, and the appellant, by her action, having in effect assailed the same, the burden is cast upon her to overthrow them by showing that the claims in controversy were not legal charges against her, for the reason that there was no law which authorized them to be allowed in favor of appellee. The case of *Snelson v. State, ex rel.*, 16 Ind. 29, and other similar decisions of this court, which appellee insists are controlling of the point involved herein, in view of the present law relative to the allowing of claims against counties, as construed by the latter decisions, must be deemed to be modified as to the broad doctrine therein enunciated and under the facts and circumstances in this case we cannot accept them as authority on the particular question involved.

For the error in overruling the demurrer to the second paragraph of the answer, the judgment is re-

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versed, with instructions to the lower court to sustain the demurrer to said paragraph and for further proceedings in accordance with this opinion.

Filed October 20, 1895.

ON PETITION FOR REHEARING.

JORDAN, J.—We have carefully considered the reasons urged by the appellee for a rehearing in this appeal, but we are still of the opinion that a correct result was reached in the former hearing. It must be remembered that the complaint to which appellee's second paragraph of answer was addressed alleged that the latter, in addition to his salary as county auditor, did, under the color of his office, illegally tax and charge the fees in controversy, and in violation of law demanded and received the money from the county. These alleged facts the answer admitted, but sought to avoid the cause of action, upon the ground that the appellee had from time to time presented his claims to the board of commissioners of the county, and that the same had been duly allowed by said board and payment thereof awarded to him in pursuance of the order of the commissioners from which no appeal had been taken. The theory of the answer was that the board, in passing upon and allowing the claims acted as a court, with full jurisdiction over the person of the parties and the subject-matter involved, and that its order in making the allowance to the appellee out of the public funds, although wrongful and illegal, was an adjudication of the validity of the claims in question and precluded the appellant from maintaining its action. We denied the contention of appellee upon this proposition, and held that the paragraph was insufficient in bar of the action for the reasons given in the opinion. It is again strenuously in-

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sisted by counsel for the appellee, that the case of *Snelson v. State, ex rel.*, 16 Ind. 29, ought to control our decision herein. That case, in holding in effect that the board of commissioners, in allowing claims against a county, exercised the powers of a court, to say the least, under former statutes, asserted a questionable doctrine. In view of the more recent legislation to which we referred in the original opinion, it must be manifest that the rule laid down in the *Snelson* case in this particular, can no longer be sustained. There is also an insistence by appellee that the money sought to be recovered was paid to him under a mistake of law, and therefore was a voluntary payment by the county, and under a well settled rule cannot be recovered. But aside from the fact that a recovery is expressly authorized by statute, it may be said that the rule preventing the recovery of money voluntarily paid, cannot be held, under the facts, to apply in the case at bar. If the allowance of the claims was made by the commissioners in defiance of a positive statute (as is section 6548, R. S. 1894; Elliott Supp., section 1975), the payment thereunder could not, in a legal sense, be considered as a payment by the county to the appellee, but the money might be said to have been obtained by him by virtue of the illegal act of the commissioners in allowing claims forbidden by the statute.

Under such circumstances, the allowance and payment could not be viewed as the act of the county, but rather as the result of the illegal act of her officials. See *Ada Co. v. Gess* (Sup. Ct. Idaho), 43 Pac. Rep. 71; *Guheen v. Curtis*, 2 Idaho, 1151; *State v. Moore*, 1 Ind. 548.

Petition overruled.

Filed April 21, 1896.

O'Kane v. Terrell et al.

No. 17,665.

O'KANE v. TERRELL ET AL.

FRAUD.—Mortgage in Fraud of Creditors.—Not Enforceable.—One who takes a mortgage on the property of another, as part of a scheme to aid him in defrauding his creditors, acquires no rights thereunder, even though a consideration was paid therefor.

From the Warren Circuit Court.

C. A. Allen and *C. V. McAdams*, for appellant.

E. F. McCabe, for appellees.

HOWARD, J.—This was an action by the appellant against the appellees, to recover the amount alleged to be due on a promissory note, and to foreclose a mortgage given to secure said note. The only question argued by counsel is the correctness of the conclusions of law upon the facts found by the court.

From the special findings it appears that the note in suit was given to appellant on January 22, 1892, by the appellee, John O'Kane, now deceased, who was then the owner of the land described in the complaint; and that thereafter, on February 8, 1892, the mortgage on said land and here in suit was given to secure said note; that said mortgage was made by said appellee, O'Kane, and was accepted by appellant, with the fraudulent intent of cheating and defrauding the creditors of said appellee, O'Kane, the note and mortgage being also without any consideration; that on March 9, 1892, said John O'Kane and his wife, Nora, executed a deed for said land to the appellee, Terrell; that among the conditions of said deed was the following: "The grantors do not warrant as against four

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certain mortgages," describing them, one of said mortgages being that in favor of appellant, and here sued on; that, at a date not named in the findings, the appellant executed and delivered to said John O'Kane a written release of said note and mortgage, stating in her release that the said note and mortgage "has been fully paid and satisfied, and I hereby release the same;" that appellant at the same time surrendered to said appellee said note and mortgage; that the said John O'Kane and his co-appellee, Terrell, afterwards took said release and went with the wife of said O'Kane before a notary public and there falsely and fraudulently caused the said wife of O'Kane to personate appellant, and, so personating appellant, to acknowledge the execution of said release, which release and satisfaction of mortgage, so acknowledged, was filed for record in the recorder's office on March 15, 1892; that on March 14, 1892, a second deed for the land "for the purpose of correcting the deed made March 9, 1892," was made by O'Kane and his wife to Terrell; this second deed reciting that the purchaser took the land subject to the mortgages mentioned in the first deed, except that the mortgage here in suit was not mentioned; that before appellant's mortgage was made, there were other mortgages, also attachment liens and tax liens on said lands, all superior to the lien of appellant's mortgage; and other debts also were due by said John O'Kane; that the deeds made by O'Kane and wife to Terrell were made as security to him for the payment of said debts, mortgages, attachment and other liens, and that Terrell paid all said liens, paying altogether a larger sum than was equal to the whole value of said land. As its conclusion of law, the court found that the appellant was not entitled to a judgment of foreclosure of her mortgage.

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All the parties to this litigation seem to have been, in a greater or less degree, engaged in fraudulent practices in relation to the liens on the land in question and the other indebtedness of its owner. Whether Terrell could defend against the assumption made by him in the first deed of the obligation to pay the note and mortgage in suit, we need not enquire. It is enough that appellant herself, the pretended holder of that note and mortgage, has no right of action. Her note and mortgage are found to be without consideration, and given to and received by her for the fraudulent purpose of cheating the creditors of John O'Kane. It is also found that she made and signed a written release of the pretended debt due her and surrendered the note and mortgage to O'Kane. There is nothing due her, and she has no right of recovery. Appellant gave nothing for her note and mortgage; but even if she had, it would not help her. "Where a grantee takes a conveyance [and the same is true of a mortgage] for the purpose of aiding the grantor in defrauding his creditors, the fact that he pays a valuable consideration does not divest the conveyance of its fraudulent character." *Bishop v. Redmond*, 83 Ind. 157. As said in *Bunch v. Hart*, 138 Ind. 1, reaffirming *Seivers v. Dickover*, 101 Ind. 495, "the law will leave the parties who have been convicted of the fraud where it finds them." See also *Anderson v. Etter*, 102 Ind. 115 (123); *Second Nat'l Bank v. Brady*, 96 Ind. 498 (page 506), and cases cited.

The judgment is affirmed.

MCCABE, J., took no part in the decision of this case.

Filed April 21, 1896.

No. 17,850

AYDELOTT v. COLLINGS ET AL.

144	602
148	146
149	425
152	555
152	556
144	602
154	402
155	17
156	509
144	602
157	533
144	602
165	254

APPELLATE PROCEDURE.—Demurrer.—Record.—An Appellate Court will not review a ruling of the trial court on a demurrer, unless both the particular pleading demurred to and the demurrer are contained in the record on appeal.

SAME.—Duty of Appellant to Establish Error.—To entitle a party to a reversal of a judgment, he must point out and establish by the record that the trial court committed reversible error, for all reasonable presumptions are indulged in favor of the rulings of the trial court.

AMENDED PLEADING.—Record.—If a complaint be amended, the amended complaint supersedes the original, and the original will form no part of the record, although copied into it.

From the Parke Circuit Court.

T. N. Rice, J. T. Johnston, J. S. McFadden and S. D. Puett, for appellant.

McNutt & McNutt, for appellees.

MONKS, J.—Appellant brought this action against appellees to recover upon certain promissory notes, and for the appointment of a receiver.

The complaint was in one paragraph.

Afterwards appellant, by leave of court, filed a second paragraph and an amended first paragraph of complaint.

Appellees filed a separate demurrer to each paragraph, which was sustained to the first and overruled to the second. Appellees thereupon filed an answer to which appellant demurred, which demurrer was overruled, and appellant refusing to plead further,

Aydelott v. Collings et al.

judgment was rendered in favor of appellees. The only errors assigned are:

1. The court erred in sustaining the demurrer to the first paragraph of complaint.

2. The court erred in overruling the demurrer to the answer.

Counsel for appellees insist that no question is presented by the errors assigned for the following reasons:

1. That the first paragraph of the complaint as amended is not set out in the record.

2. That the demurrer to said paragraph is not copied into the record or the grounds of demurrer stated.

3. The demurrer to the answer is not in the record, nor are the grounds of objection thereto shown by the record.

An inspection of the record discloses the defects and omissions therein as claimed by counsel for appellees.

The original complaint is copied into the record, but the same was amended by leave of court, and was, therefore, superseded by the paragraph as amended, and cannot be considered as part of the record. *Britz v. Johnson*, 65 Ind. 561, 562; *Westerman v. Foster*, 57 Ind. 411; Thornton Ind. Pract. Code, section 650 and note 1.

If the amended first paragraph was properly set forth in the record, no question would be presented unless the demurrer thereto was also in the record. Without the demurrer we cannot know the grounds of objection to the pleading, and not knowing the grounds of objection, we cannot adjudge that the trial court erred, but must presume that the ground of objection stated in the demurrer was one which it was proper to overrule, or that the same was so defectively

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stated as to present no question. Elliott App. Proced., sections 710, 720.

The demurrer to the answer is not in the record, and for the same reasons no question is presented by the second error assigned. All reasonable presumptions are made in favor of the rulings of the trial court, and, to entitle a party to a reversal of a judgment, he must point out and establish by the record that the trial court committed a reversible error.

This not having been done, the judgment is affirmed.

Filed April 21, 1896.

 No. 17,890.

BOYER v. ROBERTSON ET AL.

SPECIAL VERDICT.—Defective.—Venire de Novo.—Evidentiary Facts.

—A special verdict, which finds the evidentiary facts in place of the inferential facts pleaded, on which such evidentiary facts are based, is insufficient as a basis for judgment, although the evidentiary facts found are sufficient to justify a finding of such inferential facts, and a trial *de novo* should be granted.

SAME.—Recovery.—Burden of Issue.—Essential Facts.—The party having the burden of the issue cannot recover, unless the special verdict finds all the facts essential to a recovery.

SAME.—Evidentiary Facts.—Presumption.—If the jury simply find the evidence of facts essential to a recovery instead of the facts themselves, the presumption which arises on a failure to find essential facts does not obtain; but the verdict is defective and a *venire de novo* should be granted.

From the Carroll Circuit Court.

L. D. Boyd, Odell & Pruitt and *W. Ballou*, for appellant.

C. R. Pollard and *R. C. Pollard*, for appellees.

144 604
149 70
149 75
150 127
150 373

144 604
160 518

144 604
164 139

Boyer v. Robertson *al et.*

MCCABE, J.—The appellees sued the appellant to recover possession of two certain town lots and four acres of land, the complaint being in the ordinary form for the recovery of possession of real estate, except that the description of the four acres was defective.

The circuit court overruled a demurrer to the complaint. A trial of the issue formed upon the complaint resulted in a special verdict, upon which the court rendered a judgment for the plaintiffs over a motion for judgment in defendant's favor and a motion for a *venire de novo*.

The only tenable objections to the special verdict which we find are covered up in a jungle of thirty pages of appellant's type-written brief in and among a mass of irrelevant and many of them untenable propositions of law; said objections are that the special verdict finds the evidentiary facts instead of the inferential facts; and that it does not find any sufficient description of the four acres. The facts put in issue by the complaint and answer were that the plaintiffs were the owners in fee simple of the lands described in the complaint and entitled to possession, and that the defendant was in possession without right. None of these facts were found.

It was indispensably necessary that they should have been found before the plaintiffs were entitled to judgment. *Pittsburg, etc., R. W. Co. v. O'Brien*, 142 Ind. 218, and cases there cited.

Every single item of evidence necessary to justify a finding of the above mentioned facts in issue is contained in the special verdict. We do not mean to say that each item of such evidence was full enough, but each item was in some form set forth in the special verdict. But a special verdict must find the facts in issue and not mere evidence of them, so that the law

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will irresistibly infer a certain result. *Gordon v. Stockdale*, 89 Ind. 240.

The evidentiary facts are merely the evidence, and if found in a special verdict cannot afford any support to a judgment. *Whitworth v. Ballard*, 56 Ind. 279; *Gordon v. Stockdale*, *supra*; *Jones v. Baird*, 76 Ind. 164; *Pittsburg, etc., R'y Co. v. Adams*, 105 Ind. 151; *Indianapolis, etc., R'y Co. v. Bush*, 101 Ind. 582; *Tousey v. Lockwood*, 30 Ind. 153; *Davis v. Franklin*, 25 Ind. 407; *Smith v. James*, 131 Ind. 131; *Locke v. Merchants' Nat'l Bank*, 66 Ind. 353; *Louisville, etc., R. W. Co. v. Miller*, 141 Ind. 533.

The party having the burden of the issue cannot have judgment unless the special verdict finds all the facts essential to a recovery. *Waymire v. Lank*, 121 Ind. 1; *Walkup v. May*, 9 Ind. App. 409. The plaintiffs had the burden, and none of the facts essential to their recovery are found in the special verdict.

The facts found not being sufficient to entitle the plaintiff to judgment, the defendant's motion for judgment in his favor should have been sustained, unless the condition of the verdict is such as to make the defendant's remedy either a motion for a *venire de novo*, or for a new trial. *Dixon v. Duke*, 85 Ind. 434; *O'Neal v. Chicago, etc., R. W. Co.*, 132 Ind. 110.

The reason of the general rule in cases where the special verdict fails to find all the facts essential to a recovery by the plaintiff or the party having the burden, that the other party is entitled to judgment, is, that nothing appearing in the verdict to the contrary, the presumption is that the fact or facts not found, were not so found because they were not proven, and hence the verdict in such case is not defective. *Wilson v. Hamilton*, 75 Ind. 71; *Johnson v. Putnam*, 95 Ind. 57; *Spraker v. Armstrong*, 79 Ind. 577; *Deeter*

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v. *Sellers*, 102 Ind. 458; *Louisville, etc., R. W. Co. v. Buck, Admr.*, 116 Ind. 566 (2 L. R. A. 520); *Indiana, etc., R. W. Co. v. Finnell*, 116 Ind. 414; *Citizens' Bank v. Bolen*, 121 Ind. 301.

Such a verdict usually is not defective because there being a failure to find facts, the burden of which, under the issues, rested on the plaintiff, is deemed equivalent to a finding against the plaintiff as to the existence of those facts, and an express finding against the plaintiff on any or all of the issues is not a defective finding or verdict. *Ex parte Walls*, 73 Ind. 95; *Williams v. Osbon*, 75 Ind. 280; *Parker v. Hubble*, 75 Ind. 580; *Stumph v. Bauer*, 76 Ind. 157; *Henderson v. Dickey*, 76 Ind. 264; *McLaughlin v. Ward*, 77 Ind. 383; *Studabaker v. Langard*, 79 Ind. 320; *Spraker v. Armstrong, supra*; *Talburt v. Berkshire Life Ins. Co.*, 80 Ind. 434; *Ayers v. Adams*, 82 Ind. 109; *Dixon v. Duke, supra*; *City of Elkhart v. Wickwire*, 87 Ind. 77; *Nitche v. Earle*, 88 Ind. 375; *Hunt v. Blanton*, 89 Ind. 38; *First Nat'l Bank v. Carter*, 89 Ind. 317; *Davis v. Watts*, 90 Ind. 372; *Johnson v. Ramsay*, 91 Ind. 189; *Dodge v. Pope*, 93 Ind. 480; *Vinton v. Baldwin*, 95 Ind. 433; *Griffin v. Rochester*, 96 Ind. 545; *Yerkes v. Sabin*, 97 Ind. 141; *Trittipso v. Morgan*, 99 Ind. 269; *Krug v. Davis*, 101 Ind. 75; *Parmater v. State, ex rel.*, 102 Ind. 90; *Rice v. City of Evansville*, 108 Ind. 7; *Stix v. Sadler*, 109 Ind. 254; *Brown v. Jones*, 113 Ind. 46; *Indiana, etc., R. W. Co. v. Barnhart*, 115 Ind. 399; *Noblesville Gas, etc., Co. v. Loehr*, 124 Ind. 79; *Town of Freedom v. Norris*, 128 Ind. 377; *Reddick v. Keesling*, 129 Ind. 128; *Town of Fowler v. Linguist*, 138 Ind. 566.

But that is the rule only where there is nothing in the verdict to the contrary.

Where, however, the verdict shows that the jury

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have found the evidentiary facts instead of the inferential facts; that they have found the evidence instead of the facts in issue, it cannot be said that a presumption arises that the facts in issue were not proven. Because, as the verdict shows in this case, they have found evidentiary facts enough to establish the inferential facts alleged in the complaint. Such a verdict shows that the facts in issue were proven but not found. Such a special verdict is therefore ill and defective. *Locke v. Merchants Nat'l Bank, supra; Louisville, etc., R. W. Co. v. Miller, supra.* We are of opinion, therefore, that the circuit court erred in overruling the motion for a *venire de novo*.

The judgment is reversed and the cause remanded, with instructions to sustain the appellant's motion for a *venire de novo*.

Filed April 22, 1896.

No. 17,511.

ADAMS ET AL. v. LAUGEL.

APPELLATE PROCEDURE.—Conflicting Evidence.—Finding.—A finding of fact by the court on conflicting evidence will not be disturbed on appeal.

SAME.—Presumption.—Foreclosure of Mortgage.—Fraud.—Want of Consideration for Notes.—It will be presumed on appeal, in order to support a judgment foreclosing a mortgage, as to three notes which it was given to secure, that a general finding by the court against the third note was upon the theory that there was no consideration therefor, instead of that the giving of the mortgage securing it was fraudulent.

FRAUD.—A Question of Fact.—Fraud will not be presumed, but must be proved by the party alleging it.

MORTGAGE.—When Not Void.—No Consideration for Notes Secured by Mortgage.—A mortgage is not rendered void *per se* simply

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because one of several notes, which it is given to secure, is not supported by a consideration, where there was no fraudulent intent in its execution.

From the Vanderburgh Circuit Court.

T. R. Paxton, A. P. Twineham and W. D. Robinson, for appellants.

L. C. Embree, for appellee.

HACKNEY, C. J.—The appellee, John Laugel, sued Louisa J. Powell and Ecklos A. Powell upon their promissory notes, one for \$700.00, one for \$2,300.00 and one for \$3,300.00, and to foreclose the mortgage of said Louisa J. Powell given to secure said notes. To the complaint Samuel R. Adams and others, who are the appellants herein, were made defendants as junior lien-holders. The Powells answered in general denial. The appellants, Adams, Downey and the Bank of Commerce, joined in an answer in four paragraphs: 1. General denial. 2. No consideration for the notes and mortgage sued on. 3. Payment of the debt. 4. That the notes were without consideration, and that the mortgage was executed as the result of a conspiracy between the Powells and Laugel to defraud the creditors of the former.

The People's National Bank filed an answer in all respects like the above, and the appellants, Storms, Clark, and Hobberton, joined in an answer of general denial. To the several affirmative answers the appellee replied in general denial.

All of the appellants joined in a cross-complaint against Laugel and the Powells, setting up their several claims against the Powells and alleging that the mortgage was executed without consideration and as the result of a conspiracy between Laugel and the

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Powells to cheat, hinder, and defraud the creditors of the Powells; that said mortgage covered all of the property owned by the Powells at the time of its execution, and that at the time of the execution of the mortgage and at the time of the filing of the cross-complaint neither of said Powells had other property subject to execution.

Demurrers by the appellee were overruled and exceptions reserved as to the fourth paragraph of each of said answers and as to said cross-complaint. The cross-complaint was answered by general denial.

The trial resulted in a finding and decree in favor of the appellee as to said two notes for \$700.00 and \$2,300.00, and the foreclosure of said mortgage as to said notes, and resulted in a finding for the appellants as to the note for \$3,300.00.

The appellants, as cross-complainants, jointly moved the court to strike from the decree that part thereof extending a lien upon the mortgaged property for the sum of said two notes for the alleged reason that the mortgage, being fraudulent as to said \$3,300.00 note, was not enforceable as to the other two notes. This motion was overruled, and that ruling is here assigned as error. The same question is urged upon the action of the court in overruling the joint motion of the appellants for a new trial.

The appellants moved also for judgment in their favor against Laugel and Louisa J. Powell for the costs of the cross-complainants, which motion was overruled, and that ruling is assigned as error.

Passing several questions of practice and the assignments of cross-error involving the sufficiency of the answers alleging fraud and of the cross-complaint, we will consider the appellants' principal contention, namely: the alleged error of the trial court in regarding the mortgage as valid when holding that one of

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the notes secured by it was not collectible. Upon the evidence there was conflict as to the consideration for each of the three notes, and the trial court possessed the exclusive power to weigh the evidence and determine that conflict. In the exercise of that power it was held that two of the notes were valid and collectible and that the other was not. We are, therefore, not at liberty to pass upon the correctness of that decision. There was not only no evidence that the appellee knew of existing indebtedness of the Powells, and intended, by taking the mortgage, to defraud their creditors, but the only evidence offered repels the existence of that knowledge.

The most that could be claimed for the issue of fraud tendered by the appellants is that: 1, it challenged the mortgage as not supported by any consideration, and that it was taken by a volunteer; and 2, that the mortgage was void because of a conspiracy between the mortgagor and mortgagee to defraud the creditors of the mortgagor. The first of these issues failed upon the finding, which has passed beyond review, that there was at least \$3,000.00 of consideration to support the mortgage. The second of these issues failed from the lack of evidence to support the knowledge and participancy of the mortgagee in the intent to defraud creditors. Not adhering strictly to the issues so tendered by the cross-complaint, the court found a partial want of consideration, that is to say, that the \$3,300.00 note could not be supported. The pleadings which seem to permit that finding were the answers alleging that there had been no consideration for the notes. The record presenting these facts we are now asked to presume that the trial court found that the \$3,300.00 note was fraudulent; that it was included in the mortgage to aid the Powells in defrauding their creditors, and that the mortgage was so tainted with

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that fraud as to vitiate it as to all of the notes. Upon which of the two issues of the cross-complaint above suggested we are to indulge these presumptions, counsel have not advised us; but, since we have seen that it is irrevocably held that the appellee was not a volunteer, there is but one other issue. That issue is, did Laugel take the \$3,300.00 note and include it in the mortgage, intending to defraud the creditors of the Powells? Has the lower court decided that issue against the appellants? or has the issue not been decided? If decided against the appellants upon the weight of the evidence, we have no power to review that decision. The note was held not to have been supported by a consideration. That conclusion established a badge of fraud only. There may have been other badges of fraud, but there was also, as we have seen, evidence denying fraudulent design. By our statute, R. S. 1894, sections 6645, 6649, the question of fraudulent intent, in all cases charging fraud against creditors, is a question of fact and not one of law. Fraud is not presumed, but must be proven by the party alleging it. Such fraud is a crime, R. S. 1894, section 2277, and crime is not presumed as a question of law, but must be decided as a question of fact. In *Goff v. Rogers*, 71 Ind. 459, a mortgage was given for \$4,000.00, when the debt was but \$3,000.00, and it was there said: "It is contended by appellant's counsel that, as the mortgage was executed for a greater sum than that really due, the mortgage was fraudulent, and several cases from other courts are cited, looking in that direction. If we were to give the cases the effect ascribed to them, we could not recognize them as authority under our statute. Fraud is a question of fact for the consideration of the jury. It is the exclusive province of the jury to determine whether an act was or was not a fraudulent one. *Leasure v. Coburn*, 57

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Ind. 274. There are no cases, however, that we have been able to find, going so far as to hold that a mortgage is to be conclusively presumed fraudulent from the bare fact that it purports, on its face, to secure a sum in excess of the debt really due. The farthest that any of the cases go, except those based on an express statute, is to hold that the fact that a mortgage expresses on its face an amount materially greater than the true amount of indebtedness is a badge of fraud." See to the same effect *Hoey v. Pierron*, 67 Wis. 262; *Carter v. Rewey*, 62 Wis. 552; *Kalk v. Fielding*, 50 Wis. 339; *Van Patten v. Thompson*, 73 Ia. 103; *Frost v. Warren*, 42 N. Y. 204; *Weeden v. Hawes*, 10 Conn. 50; *Tulley v. Haolow*, 35 Cal. 302; Wait Fraud. Conv., section 228.

While it is unquestionably a badge of fraud to execute or to receive a mortgage for a considerable sum in excess of the actual indebtedness, it should not render the mortgage void *per se*, since there may be numerous valid excuses for the overstatement, such as an intention to cover future advances, ignorance of the mortgagee that the mortgage includes too large a sum, mistake in calculations, and the like. These observations make it perfectly clear, we think, that the existence of a fraudulent intent is always necessary; that the existence of that intent is a question of fact; that the burden of any such issue is upon the attacking party; that honest intentions and fair dealing must, in the first instance, be presumed, and that the trial court must determine the question upon the weight of the evidence.

This court, indulging all reasonable presumptions in favor of the action of the trial court, and presuming in favor of the honesty of the parties, could only conclude that the general finding of the court against the \$3,300.00 note was upon the theory of the affirma-

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tive answers of no consideration, and not upon the issues of fraud. Indeed, we regard this conclusion as unavoidable from the action of the court in overruling the motion to modify the judgment. Though the rule contended for by the appellants were the law, the refusal of the court to apply it to the case in hand implies a conclusion upon the facts denying the application of the rule.

The motion to tax the costs against Laugel and Louisa J. Powell could not be sustained for two reasons at least: 1. Ecklas A. Powell was liable with them for the proper costs; and 2, the issues of the cross-complaint were not all successful, but failed in part, and the costs attending only the successful issue could be properly charged to the defendants to the cross-complaint. Our conclusion renders it unnecessary that we should consider the sufficiency of the cross-complaint and the affirmative answers of fraud.

The judgment of the circuit court is affirmed.

Filed February 14, 1896; petition for rehearing overruled April 22, 1896.

No. 17,648.

144	614
154	235

THE PREMIER STEEL CO. ET AL. v. THE MCELWAINERICHARDS CO.

MECHANIC'S LIEN.—*Upon Buildings and Land Constituting a Single Plant.*—A single lien may be had upon all the buildings and land constituting a single plant, for materials used in an improvement relating to all the buildings without specifying the particular buildings upon which the separate portions of the materials were furnished.

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SAME.—*Time of Filing Lien.*—*Material Furnished to Several Buildings Constituting a Single Plant.*—Notice of a mechanic's lien is in time, if filed within sixty days after furnishing the last of several lots of material ordered and furnished at different times, where they are all supplied under one contract and used in the repair of several buildings constituting one manufacturing plant.

SAME.—*Foreclosure on Property in Hands of a Receiver.*—The permission of a court which has appointed a receiver over property to make him a party defendant to an action in another court to foreclose a mechanic's lien which existed on the property at the time of his appointment is not a relinquishment of control of the property which authorizes a judgment by such other court directing a public sale of the property by the sheriff with clear title to the purchaser.

From the Marion Superior Court.

Ayres & Jones and *Elliott & Elliott*, for appellants.

H. J. Milligan, for appellee.

HACKNEY, C. J.—This was an action by the appellee, The McElwaine-Richards Company, against the appellants, The Premier Steel Company, John E. McGettigan, receiver for that company, and others, and its object was to enforce a materialman's lien against the property of said Premier Steel Company. Special findings, with conclusions of law, and a motion to modify the judgment present the questions here assigned on behalf of the appellant. The facts so specially found were that the appellant, The Premier Steel Company, had been engaged in the manufacture of steel blooms, billets, and railroad iron, and had been experimenting in various methods of making steel until May 6, 1893, when McGettigan was appointed receiver; that said company's business was conducted in "one Bessemer mill; one open hearth mill; one machine shop; one foundry; one old iron rail mill; hydraulic pump, etc., and one steel mill," all upon real estate owned by said company, held within one in-

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closure without division with relation to the several buildings; that the buildings thereon were connected by railroad tracks, gas and steam pipes, were lighted by the same electric plant and were all, excepting one, used by said company in its said business; that the building so excepted was leased to the Indiana Steel Company, but was connected to and with another of said buildings by a continuous roof which covered both buildings; that said real estate, including said buildings, was intended for an entire and general plant. In 1892 said company was engaged in making extensive improvements upon said real estate, and notified appellee that it would need therein a large amount of steam, gas and water pipes, materials appellee was then engaged in selling, and that as it should order from time to time, appellee should supply such materials at the best prices, which appellee agreed to do. "In October, 1892, and continuing thereafter until the appointment of said receiver appellee furnished said company, upon its orders from time to time, material, each being a separate order, for construction, erection and repairing of said plant and all the buildings on said real estate, to the amount and value of \$7,716.66, upon which there was paid by said company \$4,220.63, leaving unpaid at the commencement of this suit \$3,496.03, which is still unpaid and was due on May 6, 1893. The material furnished by the appellee was for the use, benefit and betterment of all said property as a whole, and all of said material was used in said construction, erection and repairs aforesaid, except material to the amount and value of \$212.00. "That the material which went into each particular mill or building cannot be separated and identified, the larger portion of it being gas pipe, which was placed under ground connecting and ramifying all the

buildings." On the 12th day of May, 1893, notice of lien was filed with the proper recorder, which notice included lots owned by said company, but not within said enclosure and not covered by said buildings. It is found that \$250.00 was a reasonable attorney's fee in this cause, and it was further found that the court appointing said receiver "granted appellee the right to join said McGettigan, receiver, as defendant in this cause." As conclusions of law upon such facts the court stated that there was due appellee \$3,562.00 of principal and interest and \$250.00 as attorney's fees, for which two sums, less \$212.00, appellee was entitled to a lien upon said real estate so included within said inclosure; and "4, that plaintiff is entitled to have said lien foreclosed and the real estate sold without relief from valuation or appraisement laws to pay said judgment for \$3,600.00, interest and costs."

Judgment was rendered for appellee extending a lien upon said real estate and upon "all buildings, improvements, mills, shops, engines, boilers, machinery, furnaces, tools, implements, fixtures, rights-of-way, franchises, railroads, railroad tracks, switches, side tracks, appendages and appurtenances, in, upon, or belonging to or connected with said real estate." The sale of said property was ordered, with directions to apply the proceeds, 1st, to the costs in this case, and of the sale; 2d, appellee's judgment with interest; 3d, balance returned into court. It was also declared that "The purchaser at said sale shall take, as against the parties to this action, a clear title to said real estate."

It is first urged that, though the materials supplied may have been used in the repairs and improvements of the company's buildings, it was essential to the maintenance of a lien that they should have been supplied for the purpose of being so used. That is to say, that the appellee supplied them, at the time contem-

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plating the use made of them. This fact is certainly well found by the court. As will be seen the object of the purchase was stated before materials were furnished, and *appellee furnished said company, upon its orders from time to time, material, each being a separate order, for construction, erection and repairing said plant, and all the buildings thereon.*

It is next claimed that the conclusions of law were "erroneous for the reason that it is not shown for what buildings the materials were furnished, nor in what buildings they were used, while it is shown that several of the buildings were separate and independent, and yet the lien was taken, not only on all the buildings, but also on vacant lots across the street." While the notice of lien described other lots than those covered by the plant, the lien as adjudged by the court did not include such lots. It is not claimed for appellants that to include in the notice of such lien more land than the lien could be maintained upon would vitiate the lien, and we observe no good reason in such a claim. But that the lien was extended to all of the buildings raises a question of greater moment. The following is quoted, by counsel, from Jones on Liens, sections 1310, 1311, as stating the correct rule: "Where materials are furnished for one or more of several buildings upon a large tract of land, used together in the general business of a manufacturing firm or corporation, a mechanics' lien must be filed against the particular building or buildings only to which the materials were supplied and the lots and curtilages appurtenant thereto; but not against the entire premises, including the old buildings as well as the new."

We have no occasion to discuss here the rule with reference to the improvement of one of a number of buildings upon a large tract of land, as the repairs of

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a coal dump situated upon several hundred acres of mining land. Here we have material supplied under one contract, though at various times and upon separate orders, for the improvement of several buildings erected upon a small tract within the city of Indianapolis, the description of which we have omitted for the sake of brevity. The improvement related to all of the buildings; "connecting and ramifying all the buildings." The buildings were erected as parts of a single plant, and, though one of them was occupied by a tenant company, that building was, in its construction, connected with, or a part of, another of the buildings, and the ground was not divided with reference to the several buildings. The author from whom the above quotation is taken has another statement of the rule which has application to the question now in hand: "Where labor is performed or materials furnished under one contract upon several buildings, all situate upon one lot of land belonging to the contracting owner, the lien attaches to all the land for the whole value of the labor performed, and it is immaterial whether the contract specifies one sum for all work or separate amounts for each building." Section 1313. Again it is said: "Under a contract to erect two or more houses for an entire sum, though situate upon different lots, the lien is upon all the buildings and lots, and not upon each separately." Section 1317. In *Phillips v. Gilbert*, 101 U. S. 721, it was insisted that the lien was void because it included six houses upon several lots. It was there said: "We think there is nothing in the objection. The contract was one and related to the row as an entirety, and not to the particular buildings separately. The whole was a building, within the meaning of the law, from having been united by the parties in one contract as one general piece of work."

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In *Hall v. Sheehan*, 69 N. Y. 618, it was held that materials furnished indiscriminately in the erection of several contiguous buildings may, for the purpose of a mechanic's lien, be regarded as a single building and that one notice covering all will support such a lien. Of the same effect generally are *St. Louis National Stockyards v. O'Reilly*, 85 Ill. 457; *Choteau v. Thompson*, 2 Ohio St. 114; *Hill v. LaCrosse R. R. Co.*, 11 Wis. 223; *Doolittle v. Plenz*, 16 Neb. 153; *Brabazon v. Allen*, 41 Conn. 361; *Crawford v. Anderson*, 129 Ind. 117. The statute, R. S. 1894, section 7255, authorizes a lien "separately or jointly" upon the various structures repaired "and on the interests of the owner of the lot or land on which it stands, or with which it is connected." The reason distinguishing joint and several liens is given in Phillips on Mechanics' Liens, section 376, and is quoted in *McGrew v. McCarty*, 78 Ind. 496: "If the work be done or materials are furnished upon distinct premises, the lien must be against each of the several premises, according to the value of the work and materials incorporated in each, and not against both for the aggregate amount. The reason a joint claim may be sustained against several houses put up at the same time, without an interval between them, is, that they may be considered as one building, and, consequently, as an integer or unit which may be covered by one claim," etc.

It is objected also that the findings having disclosed the furnishing of materials upon separate orders, beginning in October, 1892, and closing in May, 1893, "which constituted independent contracts, yet the notice attempted to include all and was not filed until May 12, 1893, much more than sixty days after the materials had been furnished under most of the con-

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tracts." The error in this contention is in construing the facts found as disclosing a separate contract for each order of material. We think it clear, from the special finding, that the contract was made in October, for the materials to be supplied from time to time as needed in making the repairs and improvements, the making of which occupied the period between October and May 6, and the lien having been filed May 12, was within the time required by the statute. If each order and delivery of materials during the progress of an improvement constituted a separate contract and required a separate lien, it will be readily seen that instead of providing a practical, simple, and efficient method of security to the laborer and materialman, as the statute certainly intends, a complication would arise requiring many liens or the delivery of all materials at one time or the performance of all labor by continuous and uninterrupted service.

The appellants insist, finally, that the trial court erred in overruling their several motions to modify the judgment directing the sale of the real estate and adjudging that the purchaser take a clear title. This question rests upon the proposition that by the receivership the property was *in custodia legis*, and that a court, other than that in which the receivership is pending, has no authority to deprive the court having custody of its possession. That this proposition is correct there can be no doubt whatever, but counsel have been unable to find authority on either side of the question as to whether the court in custody surrenders its possession and submits to a decree and sale by granting the lienor permission to sue the receiver. The reason that permission is required doubtless is that the court's officer may not be involved in constant and expensive litigation, and that the court's possession may not be placed in peril by the exercise

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of conflicting jurisdictions. The end sought by the rule is not only the avoidance of conflict in the jurisdiction of the courts, but the preservation of the interests of creditors and debtors. These interests have been entrusted to the court of equity, which affords a more comprehensive and perfect system of justice than the court of law, in order that all may be guarded and protected, each with reference to every other. If the property in question should be sold upon the judgment in this case, the sale would be by public outcry, a method often not attended by results so satisfactory, and upon the wisdom and discretion of the sheriff rather than of the chancellor, who may approve or disapprove the receiver's sale. If the right of the lower court was to direct the sale, by its own officer and upon execution as in other instances, that right would be in utter disregard of the condition of the estate as to the ability of the receiver to realize by certificates, rentals or other means, permitted by the court in possession, sums sufficient to pay the appellee's claim and extinguish the lien. Any possible right of the receiver to redeem would be embarrassed by additional costs and ultimate losses to the general creditors and a redemption by any creditor would not only meet the same embarrassment, but it would result either in giving such redeeming creditor an advantage over other creditors or of redeeming to his own inconvenience that all creditors might be protected. If the whole subject were within the control of the court appointing the receiver, the lien-holder's interest could be protected by his right of priority to the proceeds of any sale; the opportunity for competition in selling at private sale would be afforded; the wisdom of the chancellor could be taken upon the prudence and fairness of the sale and the adequacy of the consideration; costs would be spared and redemption complica-

tions avoided. There are probably other illustrations of the value and necessity of the rule which would enable the court in custody of the property to control its sale and the distribution of the proceeds, but these will suffice to make clear the impropriety of permitting another court to absorb the functions of the court in possession and possibly strip it of all property and all opportunity to serve the beneficial ends for which it was given jurisdiction.

In High on Receivers, 3d ed., section 141, it is said: "So extremely jealous are courts of equity of an interference, *pendente lite*, with the possession of their receivers, that they will not ordinarily permit property which is the subject of the receivership to be sold on execution." *Robinson v. Atlantic, etc., R. W. Co.*, 66 Pa. St. 160; *Skinner v. Maxwell*, 68 N. C. 400; *Wiswall v. Sampson*, 14 How. 52; *Edwards v. Norton*, 55 Tex. 405; *Ellis v. Vernon Ice, etc., Co.*, 86 Tex. 109; *Walling v. Miller*, 108 N. Y. 173; *Thompson v. McCleary*, 159 Pa. St. 189. "And while the appointment of a receiver does not destroy existing liens upon the property, it prevents their enforcement by the ordinary legal process, and compels the persons asserting such liens to seek their remedy in the cause in which the receiver is appointed." *Walling v. Miller, supra*; *Ellis v. Vernon Ice, etc., Co., supra*. "Even though an execution has been levied upon the property before the appointment of the receiver, it is held that there cannot be a lawful sale under such execution without leave of the court appointing the receiver." *Walling v. Miller, supra*. "The proper remedy for a judgment creditor who desires to question the receiver's right to the property, is to apply to the court appointing him, to have the property released from the receiver's custody, in order that he may proceed against it under his judgment." *Robinson v. At-*

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lantic, etc., R. W. Co., supra; Thompson v. McCleary, supra; Dugger v. Collins, 69 Ala. 324. “To permit the property, while in custody of the receiver, to be levied upon and sold under the process of another court, would at once give rise to a conflict of jurisdiction and would seriously interfere with and impair the receiver’s right to the management of the property. So when real estate is in the actual possession of a receiver, pending litigation as to the title, it is not subject to levy and sale under execution to satisfy a judgment rendered subsequent to the receiver’s appointment.” *Edwards v. Norton, supra.* Again it is said, section 142, “As still further illustrating the aversion entertained by the courts of equity toward any interference with the possession of their receivers, it is held that a receiver is not justified in paying out money in any other manner than upon the order of the court appointing him, and that this court will not sanction a payment made by him, even upon the compulsory process of another court. And when a judgment creditor has attached money in the hands of a receiver, under proceedings instituted in a court of law, and has obtained an order therein for the payment of the money attached, which order is obeyed by the receiver, such payment will not be allowed by the court in passing his accounts.” *De Winton v. Mayor, etc., 28 Beav. 200.*

Under the rules here declared, the doubtful propriety of ever permitting actions against receivers in courts other than that making the appointment is made manifest, and that the consent of the appointing court to make the receiver a party defendant was not a consent to relinquish the possession and control of the property seems to follow.

In our judgment the consistency of these rules with the objects for which they were designed renders the conclusion necessary that the consent to sue is but for

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the purpose of submitting to another court the inquiry as to the extent of the credit, the validity and priority, as between the parties, of the lien claimed, and that the application of the property to the debt and preservation of the rights of the creditor so ascertained must rest with the appointing court, unless it has clearly parted with that right. We conclude, therefore, that the trial court erred in overruling said motions to modify the judgment.

It is urged by the appellee, upon assignment of cross-error, that its judgment should have been increased by an interest charge from the time the account was found to be due to the date of the judgment. No authority for this contention is cited, and we know of none. The statute, R. S. 1894, section 7045, provides for the allowance of interest "on an account stated from the date of settlement, or on an account closed upon the day an itemized bill shall have been rendered and payment demanded," but the findings do not bring the claim within these provisions.

The judgment is reversed, with instructions to sustain the appellants' several motions to modify the judgment.

Filed April 23, 1896.

NOTE.—A review of the authorities on the right to file a single mechanic's lien against several buildings is found in a note to *Wilcox v. Woodruff* (Conn.), 17 L. R. A. 814.

Keith *et al.* v. Ault *et al.*

No. 17,699.

KEITH ET AL. v. AULT ET AL.

DESCENT.—Adopted Child.—An adopted child of a deceased husband, but not of the wife, is not entitled to the protection of section 2641, R. S. 1894, providing that if a widow marry a second time, holding real estate in virtue of a previous marriage, and there be a “child * * * alive by such marriage,” the widow cannot, with or without her husband’s consent, alienate such land, and upon her death during the marriage it shall go to “her children” by the marriage in virtue of which it came to her, although section 837 provides that an adopted child shall receive all the rights and interest in the estate of the adopting father or mother which a natural heir would be entitled to.

From the Pike Circuit Court.

E. P. Richardson and *A. H. Taylor*, for appellants.

J. W. Wilson and *S. G. Davenport*, for appellees.

HOWARD, J.—A demurrer was sustained to appellant’s complaint for ejectment; and the correctness of this ruling is the only question for our consideration.

From the complaint it appears that on the first day of November, 1881, one James H. Lemmon, who was then the owner of the land in controversy and of certain other lands, departed this life intestate, leaving as his only heirs his widow, Mary A. Lemmon, and the appellant, Georgiana L. Keith, his adopted daughter; that partition was made of decedent’s real estate between said widow and adopted child; that the part of said real estate so set off to said child was by the administrator sold to pay the debts of the estate; that the widow and child continued to live upon the share set off to the widow; that on June 3, 1884, the widow mar-

ried one Joseph Damewood, the said child still continuing to live in the family; that on January 6, 1887, the said Mary A. Damewood (formerly Lemmon) and her husband, Joseph Damewood, sold and conveyed to the appellees the land set off to her as widow of her first husband; that appellees at once went into possession of said land, and have continued in possession ever since, claiming to be the owners of the same; that on July 12, 1892, the said Mary A. Damewood died intestate; that from the date of said appellant's adoption by James H. Lemmon until the death of the said Mary A. Damewood, the said Mary A. always treated the said appellant, Georgiana, as her own child; that afterwards the said Georgiana intermarried with her co-appellant, Isaac Keith; that by reason of the premises the appellants claim to be the owners in fee simple of said land, and demand possession thereof and damages for its detention.

The appellant Georgiana was the adopted child of James H. Lemmon, not of his wife, Mary A. Lemmon. James H. Lemmon was never married before his marriage to said Mary A. Lemmon.

It is contended that the rights of the appellant Georgiana in the estate of her adopted father are, by force of the statutes for the adoption of heirs, the same as if she were his natural child; and the following from section 837, R. S. 1894 (section 825, R. S. 1881), is referred to in support of such contention. "From and after the adoption of such child it shall take the name in which it is adopted and be entitled to and receive all the rights and interests in the estate of such adopting father or mother, by descent or otherwise, that such child would if the natural heir of such adopting father or mother."

There is no doubt, as said in *Warren, Admr., v. Prescott*, 84 Me. 483, that "it is as competent for the legis-

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lature to place a child by adoption in the direct line of descent as for the common law to place a child by birth there." The only question to be decided is, what the statute does provide as to the rights of an adopted child under the circumstances of this case?

The appellant bases her claim to the land in controversy on the following provisions of section 2641, R. S. 1894 (section 2484, R. S. 1881): "If a widow shall marry a second or any subsequent time, holding real estate in virtue of any previous marriage, and there be a child or children or their descendants alive by such marriage, such widow may not, during such second or subsequent marriage, with or without the assent of her husband, alienate such real estate; and if, during such marriage, such widow shall die, such real estate shall go to her children by the marriage in virtue of which such real estate came to her, if any there be."

It is not questioned that by the statute for the adoption of heirs, already cited, the appellant was "entitled to receive all the rights and interest in the estate" of her adoptive father that she would have received if she had been his natural child. As a matter of fact, her rights as the child of James H. Lemmon were fully recognized in the partition of his real estate, a child's full part being set off to her, subject, as in the case of other children, to the payment of her father's debts. But for that reason it does not follow that she becomes the owner of the widow's part of the same real estate by virtue of the special provisions of the statute last above cited.

By no stretch of meaning can the appellant Georgiana be described as a child of the widow, Mary A. Lemmon, "by the marriage in virtue of which such real estate came to her." The appellant is not even an adopted child of the widow, to say nothing of being the child of such widow by her marriage to James

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H. Lemmon. The statute was evidently intended to apply only to children born to the husband and wife, and to the lands received by the wife from her husband on his death. Such lands during her second marriage she shall not sell; and in case she dies during such second marriage the lands so received by her whether she has so sold them or not, "shall go to her children by the marriage" to her first husband; not to her children by adoption, still less to a child not adopted by her.

No doubt, if Georgiana had been adopted by both Mr. and Mrs. Lemmon she would have inherited from Mrs. Lemmon as any other child from its parents. There is here, however, no such case.

The exact question raised in this case was decided against the contention of appellant in *Barnes v. Allen*, 25 Ind. 222, and in *Isenhour v. Isenhour*, 52 Ind. 328. See also *Humphries v. Davis*, 100 Ind. 274; *Markover v. Krauss*, 132 Ind. 294.

Had James H. Lemmon been married before his marriage to Mary A. Lemmon, had appellant been adopted by him and his former wife, and had Mary A. Lemmon been a second and childless widow, as was the case in *Markover v. Krauss*, *supra*, then we should have another question, and one not under the statute here under consideration, but under section 2644, R. S. 1894 (section 2487, R. S. 1881).

Judgment affirmed.

Filed April 23, 1896.

NOTE.—The legal status of adopted children is discussed with a review of the authorities in a note to *Warren v. Prescott* (Me.), 17 L. R. A. 485.

No. 17,829.

JAMES v. LAKE ERIE AND WESTERN RAILWAY CO.

APPEAL.—*When Premature.*—An appeal from the ruling of the trial court sustaining a demurrer, taken before entry of final judgment thereon, is premature.

From the Madison Circuit Court.

Wood & Ellis, for appellant.

A. E. Hackedorn, J. B. Cockrum and Chipman, Keltner & Hendee, for appellee.

MONKS, J.—This is the second appeal of this cause. The first appeal was to the Appellate Court, where the judgment was reversed and the court below directed to sustain the demurrer to the complaint. *Lake Erie, etc., R. R., Co. v. James*, 10 Ind. App. 550. On the return of the cause to the court below, the demurrer was sustained and appellant filed an amended complaint. Appellee demurred to the amended complaint for want of facts, which was sustained, to which ruling of the court appellant excepted. The only error assigned in this court calls in question the action of the court in sustaining appellee's demurrer to the amended complaint.

Counsel for appellee insist that no question is presented by the record for the reason that it does not appear from the record that final judgment has been rendered in the cause.

An appeal only lies from judgments that make a disposition of a cause except as provided by statute. *Thomas, Admr., v. Chicago, etc., R. W. Co.*, 139 Ind.

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462; *Champ v. Kendrick*, 130 Ind. 545; *Northcutt v. Buckles*, 60 Ind. 577.

The final entry of the proceedings of the court below is as follows: "Comes now the parties by counsel and the demurrer to the complaint is sustained by the court, to which ruling of the court the plaintiff (appellant) excepts and refuses to plead further, and prays an appeal to the Supreme Court, which prayer the court grants."

As no final judgment was rendered, the appeal was prematurely taken. The appeal is therefore dismissed.

Filed April 23, 1896.

No. 17,917.

DUDENHOFER ET AL. v. JOHNSON ET AL.

PLEADING.—*Cross-complaint.*—*Judgment.*—*Mortgage.*—A cross-complaint in an action to foreclose a mortgage, which sets up a judgment procured against the mortgagor before the execution of the mortgage, is fatally defective on demurrer if it fails to state that such judgment is a lien on the premises sought to be foreclosed; and it is not helped in this respect by anything contained in the complaint tending to show that fact, since a cross-complaint must be complete in itself without aid from the other pleadings in the case.

From the Allen Superior Court.

N. D. Doughman and *C. H. Worden*, for appellants.

Bell, Barrett & Morris, *A. H. Bittinger*, *Breen & Morris*, *E. V. Emrich* and *Randall & Doughman*, for appellees.

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MCCABE, J.—The appellee brought suit against one Henry Keller and wife to foreclose a mortgage executed by them to her on April 28, 1893, on eighty acres of land in Allen county, to secure a loan of some \$2,200.00 and interest. She made defendants to her complaint a large number of lien-holders, by both judgments and mortgage, all of which liens she alleged to be junior to the lien of her mortgage. She made the appellants, Dudenhofers, Buecher and Sherer, defendants, alleging that they claimed to have some lien upon the premises, and asked that they be required to set it up or be barred. But it is averred that the lien of appellee's mortgage is senior to all the liens and claims of all the defendants. Proper issues were joined upon the complaint. And the above-named appellants filed a cross-complaint in two paragraphs, to which the court sustained a several demurrer on the ground that neither paragraph stated facts sufficient to constitute a cause of action.

A trial of the issues formed resulted in a general finding for plaintiff and that the lien of her mortgage was senior and superior to the liens of the various judgments and mortgages held by the different defendants and a foreclosure decree followed.

The above-named defendants have appealed, joining with themselves as co-appellants the other defendants below, some of whom, Emerick, Kover and the Hamilton National Bank, have appeared and declined to join in the appeal, and hence their names as appellants are stricken out.

The only error assigned and urged in argument is the ruling of the court in sustaining the demurrer to the first and second paragraphs of the cross-complaint of the above named appellants.

The substance of the first paragraph thereof is that one Mayer had, prior to the execution of the plaintiff's

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mortgage, recovered a judgment in the superior court of Allen county against the cross-complainants and Henry Keller upon a note executed by said Keller to one George Wait; that said note was indorsed by said Wait to these cross-complainants, who had indorsed it to said Mayer, who recovered the judgment thereon as aforesaid on April 28, 1891, in the sum of \$126.41 and \$16.95 costs; that the complaint in that case set out a copy of the note and alleged that these cross-complainants were held only as indorsers on said note; that the judgment as entered did not set out that these cross-complainants were only indorsers upon said note and sureties for said Keller; that execution duly issued on said judgment and Keller being insolvent these cross-complainants were compelled to pay the same on June 2, 1891, amounting to \$127.13 and costs amounting to \$22.50 to the sheriff of Allen county; that the sheriff returned the execution indorsed as follows: "This execution is returned satisfied as to George P. Dudenhofers, Henry E. Buecker and Henry P. Sherer, and unsatisfied as to Henry Keller, the sureties having paid said judgment and costs June 2, 1891. Paid plaintiff \$127.13. Clerk \$16.95, retaining my fees. George H. Viberg, sheriff, by P. J. Wise, deputy;" that said execution was numbered 1756, and said return was duly recorded by the clerk of said superior court in the execution docket No. 3 of said superior court of Allen county; that said judgment was endorsed as follows: "Judgment paid by George P. Dudenhofers, Henry E. Buecker, Henry P. Sherer, June 9, 1891. See return of execution No. 1756;" that no part of said judgment has ever been repaid to them; that the lien of said judgment upon the premises described in plaintiff, Ellen V. Johnson's mortgage set out in her complaint, is prior and superior to the lien of the plaintiff's mortgage and prior

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and superior to the liens of the defendants herein and these cross-complainants ask the court to decree that they have the first lien upon the premises described in plaintiff's mortgage, and that they shall first be paid, etc.

The second paragraph only differs from the first in that it states that the judgment as entered omitted by mistake to show that the cross-complainants were endorsers and sureties on the note.

Counsel on both sides have discussed a number of interesting questions, which the ruling on the demurrer to the foregoing pleading presents. But there is one defect which we think all sufficient to justify the ruling of the superior court in holding both paragraphs bad. There are no facts stated in either paragraph showing that the Mayer judgment ever became a lien on the land covered by the appellee's mortgage, indeed, there is no allegation in either paragraph that Keller ever owned any land in Allen county, or anywhere else.

It is true these facts do appear in the plaintiff's complaint. But it is settled law in this State that "a cross-complaint, like a complaint, must be good within and of itself without aid from other pleadings in the cause." *Conger v. Miller*, 104 Ind. 592; *Masters v. Becket*, 83 Ind. 595; *Campbell v. Routt, Admr.*, 42 Ind. 410; *Ewing v. Patterson*, 35 Ind. 326.

The superior court did not err in sustaining the demurrer to both paragraphs of said cross-complaint.

The judgment is, therefore, affirmed.

Filed April 23, 1896.

Tucker v. Hyatt.

No. 17,268.

TUCKER v. HYATT.

HARMLESS ERROR.—Evidence.—Breach of Marriage Contract.—The admission in an action for breach of promise of marriage, of a decree divorcing plaintiff, if error, is harmless, where plaintiff's competency to enter into the contract in suit is not denied.

EVIDENCE.—Disputed Signature.—It is not error to allow counsel on the cross-examination of a witness who has testified to the genuineness of a disputed signature, to put into the hands of the witness for comparison signatures of the same person to papers properly in the record, as it is not necessary that such papers should first be put in evidence.

SAME.—Handwriting.—Opinion.—The mere fact that a witness as to the genuineness of handwriting has only seen the person write since the beginning of the trial is not enough to render his evidence incompetent.

SAME.—Genuineness of Disputed Signature.—Comparisons.—Appellate Procedure.—An objection to the receipt of expert testimony as to the genuineness of a disputed signature, founded on a comparison thereof with signatures of the same person to papers in the cause, on the ground that such signatures have been made since the alleged signature became a matter of controversy, does not suggest the objection that they may have been made in a disguised hand for the purpose of manufacturing evidence; and hence the question as to the admissibility of the testimony over such an objection is not presented on appeal.

PLEADING.—Complaint.—Breach of Marriage Contract.—Presumption.—Evidence.—Plaintiff, in an action for breach of marriage contract, need not allege or prove defendant's capacity to enter into such contract, for such capacity will be presumed.

From the Miami Circuit Court.

H. S. Biggs and L. W. Royse, for appellant.

J. D. McLaren, E. C. Martindale, F. D. Butler and L. R. Stookey, for appellee.

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HOWARD, C. J.—This was an action brought by the appellee against the appellant for damages for breach of promise of marriage.

The trial resulted in a verdict for \$6,000.00 in favor of appellee, upon which judgment was rendered.

Numerous errors are assigned on this appeal, but counsel discuss only the overruling of the motion for a new trial.

To the complaint of appellee, appellant pleaded a written release of the marriage contract, claiming that such release had been signed by her for a consideration of \$300.00. The appellee, however, denied the execution of the release; and evidence went to the jury on both sides of the issue so formed.

The appellant produced three witnesses, Albert L. Keysecker, his wife, Lugarda Keysecker, and Joseph Tillman, who each testified that they were acquainted with the handwriting of the appellee, and that the signature to the release was her genuine signature.

On the cross-examination of these witnesses, the court permitted appellee's counsel, over the objection of appellant, to place in the hands of the witnesses the appellee's affidavit for a change of venue and her verified reply of *non est factum*, and have the witnesses compare appellee's signatures to those papers with the signature of the release. It is claimed that this was error.

In *Thomas v. State*, 103 Ind. 419, the defendant denied having written a disputed letter. On cross-examination, he was shown other letters and asked to say in whose handwriting they were. Objection was made to such cross-examination on the ground that the letters so offered for comparison "were not papers in the case, and were not referred to in the examination in chief." The letters offered for comparison were not admitted to be genuine, but there was evi-

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dence to show that they also had been written by the defendant. It was held that the cross-examination was proper.

So in 1 Wharton Ev. (3d Ed.), section 710, it is said: "There is little question that a witness may on cross-examination be tested by putting to him other writings, not admitted in evidence in the case, and asking him whether such writings are in the same hand with that in litigation."

The rule in England, as fixed by statute, 17 and 18 Vic., ch. 125, section 27, is that: "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."

We think there can be little doubt that in this State, after some fluctuation in our decisions, the rule is, that any writings admitted to be genuine, or writings which are properly papers in the case for any purpose, may be used, by way of comparison, to prove, or disprove, the genuineness of the writing in dispute. *White, etc., Co. v. Gordon*, 124 Ind. 495; *McDonald v. McDonald*, 142 Ind. 55, and cases cited.

The writings used for comparison in the case at bar, being the affidavit of appellee for a change of venue, made and signed by her long before the release in dispute was brought into the record by appellant, and her verified reply, were both "papers in the case;" papers, too, which the appellant on the trial admitted were "before the jury for all purposes," and, under the rule above stated, it was not error to allow these papers to be used by the witnesses, on cross-examination, to compare the signatures of appellee thereto with the signature to the release.

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Complaint is next made that two of appellee's witnesses were allowed to testify as to the genuineness of the signature to the release, from having seen appellee write; although their knowledge of her handwriting had been acquired only since the controversy began.

It may be noted that appellant opened the way for this line of evidence, by calling witnesses who were shown to have only a like acquaintance with appellee's handwriting. Moreover, it does not appear that appellee's handwriting was executed on any of the occasions referred to for the purpose of manufacturing evidence for the trial. The witnesses simply gave the facts as to the source of their acquaintance with the handwriting. The weight which might be given the evidence was a question for the jury. The mere circumstance that a witness has become acquainted with handwriting since the opening of a trial, is not of itself enough to make his evidence as to the genuineness of the handwriting incompetent. We do not think any abuse of discretion is shown in the admission of the testimony complained of.

Fault is also found that counsel for appellee took the verified reply and the release and submitted them to the jury for comparison of the signatures. These papers were a part of the record, and were before the court and jury for all proper purposes. It was not necessary to introduce them in evidence; they were already in for that purpose, and might therefore be commented on by counsel and inspected by the jury. *Colter v. Calloway*, 68 Ind. 219; *Boots v. Canine*, 94 Ind. 408; *Bell v. Parey*, 7 Ind. App. 19.

Counsel for appellant finally contend that the court erred in admitting in evidence a transcript of the record and decree of divorce of the appellee from her former husband, as entered in the circuit court of the

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county of Otsego, in the State of Michigan. Even if it were error for any reason, to admit this evidence, the error was harmless; for appellee's competency to enter into the marriage contract with appellant was not denied. She did not need to allege or prove that she was a woman, that she was of marriageable age, that she was unmarried, or that she was otherwise competent to enter into a contract of marriage. Her capacity to enter into such contract will be presumed in the absence of averment and proof to the contrary.

In *Jones v. Layman*, 123 Ind. 569, which, like this, was an action on breach of marriage contract, it was contended that the complaint was bad because it was not alleged that the parties were of marriageable age. The court said: "There is nothing in this objection. The presumption is, as to all contracts, that the parties were competent to contract, until the contrary is made to appear."

By section 359, R. S. 1894 (section 356, R. S. 1881), it is provided that: "All defenses, except the mere denial of the facts alleged by the plaintiff, shall be pleaded specially."

Appellee was not required to allege her capacity to enter into the contract: it was for appellant to plead specially, in bar, her want of capacity.

"In an action of this kind," said Lotz, J., in *Walker v. Johnson*, 6 Ind. App. 600, also an action for breach of promise of marriage, "there are many things that a defendant may plead in bar of a recovery, and there are many things that he may give in mitigation of the amount of recovery. The rule is, that if he relies on a matter in bar he must plead it specially."

Appellant, therefore, not having filed an answer averring appellee's want of competency to enter into the marriage relation, she was under no obligation to prove such competency.

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But even if such evidence were necessary on the part of appellee, we are of opinion that the certified copy of the decree of the Otsego County, Michigan, Circuit Court, a court of general jurisdiction, and having a judge, a clerk, and a seal, as such copy is set out in the record, was sufficient for the purpose for which it was offered. The proceedings and decree are authenticated by the clerk and judge of that court as required by the act of Congress, in such case made and provided. Section 458, R. S. 1894 (section 454, R. S. 1881). See also section 479, R. S. 1894 (section 472 R. S. 1881); *Bailey v. Martin*, 119 Ind. 103; *Teter v. Teter*, 88 Ind. 494; *Hamilton v. Shoaff*, 99 Ind. 63.

No available error appearing, the judgment is affirmed.

Filed November 21, 1895.

ON PETITION FOR REHEARING.

HOWARD, J.—In the petition for a rehearing in this case, counsel for appellant confine their argument almost wholly to the discussion of a single error alleged to have been made in the trial court, and which, it is contended, has not been sufficiently considered in this court. The facts in relation to the alleged error are set out in appellant's brief as follows:

“The sixteenth reason assigned for a new trial reads as follows:

“ ‘That the court erred in admitting in evidence over the objection of the defendant, the evidence of the witness, Russell Morgan, which evidence consisted in the said witness comparing what purported to be the signature of the plaintiff to her affidavit for change of venue filed in this cause, and what purported to be the signature of the plaintiff to her verified reply filed in this cause, with the signature to the written

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release described in the defendant's third paragraph of answer in this cause, and in stating to the jury that the signature to said purported affidavit and said purported reply was not written by the same person who wrote the signature to said release.'

"The above reason for a new trial is based upon the following questions propounded to the witness, Russell Morgan, by appellee and answers thereto, as well as other questions to and answers by the same witness:

" 'You may examine the signature on this paper marked No. 16, there Imogene Hyatt, and also examine the signature on the paper in the case entitled the affidavit for a change of venue, and also the signature in the case entitled the reply to the defendant's answer, and state to the jury whether or not they were all three written by one and the same hand in your judgment.

" 'The defendant objects to the question because the comparison is admitted to be made with the writing in question, and the papers not offered in evidence, and signatures made since the signature became a question of controversy as to the genuineness of the signature of the plaintiff, and comparison made with the signatures not admitted by the defendant to be genuine and that the papers with which the comparison is made are not in evidence for any other purpose. Which objection is overruled and defendant excepts.'

"To which question the witness answered: 'I would say in my judgment, they are two different hand-writes.' "

The objection as thus made by the appellant is not altogether free from obscurity. We think, however, that it did not present to the trial court the question

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urged by counsel on this appeal. The question here urged is stated in the brief of counsel as follows:

“The precise question here is, can a disputed signature be compared with a signature to a verified reply of *non est factum*, as a standard of comparison by an expert, and express an opinion on such comparison alone as to the genuineness of the disputed signature when the signature used as the standard was made for the sole and express purpose of raising the identical issue to be determined by such evidence?”

By this statement, if we understand counsel, it is sought to bring here for decision the question whether a party can call an expert to compare the signature to a paper in dispute with signatures made by the party to papers filed by him in the case; the objections suggested being that the signatures used for comparison may have been written in a disguised hand, and the evidence be therefore, in effect, self-serving.

If this is the question now sought to be raised, we are satisfied that an examination of the objection made on the trial, and which we have set out above, will show that the objection as so made did not bring the question to the attention of the court ; and, consequently, that the question now so earnestly argued by counsel was not passed upon in the ruling complained of.

The objection made on the trial is, substantially, that the affidavits proposed to be used for comparison had not been offered in evidence, and that the signatures thereto were made since the controversy began. But the fact that signatures had been made after the controversy began would not, of itself, make the comparison improper. Nothing remains in the objection made before the trial court, therefore, but that the papers had not been offered in evidence. Of this

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objection we are free to say that it does not impress us as being altogether ingenuous. The record does in fact show that the affidavits were offered in evidence, as follows:

"The plaintiff here offers in evidence the complaint and file marks thereon, the affidavit for a change of venue filed in this case, and we also offer in evidence the plaintiff's reply to the defendant's answer.

"The defendant objects for the reason that the papers are before the jury for all purposes anyway; and with the understanding that they are before the jury for all purposes, the offer is withdrawn."

So far, then, as the objection made on the trial is concerned, namely, that the affidavits had not been offered in evidence, it is clear that appellant waived the question.

And so far as concerns the objection made on this appeal, namely, that appellee should not have been permitted to make comparison of the disputed paper with papers in the case signed by her, and in the signing of which the handwriting might have been simulated, "for the sole and express purpose of raising the identical issue to be determined by such evidence," that question was not presented for the consideration of the trial court, and is therefore not one for this court to pass upon in review. This view of the case now urged by counsel, we may also add, was not considered or passed upon in the original opinion.

On the general subject of comparison of handwritings, see *Chance v. Indianapolis, etc., G. R. Co.*, 32 Ind. 472; *Burdick v. Hunt*, 43 Ind. 381; *Huston v. Schindler*, 46 Ind. 38; *Forgey v. First Nat'l Bank*, 66 Ind. 123; *Shorb v. Kinzie*, 80 Ind. 500; *Thomas v. State*, 103 Ind. 419; 1 Greenl. Ev., section 581; Best Ev., sections 232, 248; Lawson Exp. Ev., page 379; Rogers Exp. Test. (2d ed.), section 130; Harris Identifi.,

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sections 383, 386, 426; 9 Am. and Eng. Ency. of Law (1st ed.), p. 279; note to *Dresler v. Hard* (N. Y.), 12 L. R. A. 456.

The petition is overruled.

Filed April 24, 1896.

No. 17,531.

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144	644
164	673
144	644
168	234
168	503

MUNICIPAL CORPORATION.—*Ordinance.—Unreasonableness.*—An ordinance cannot be successfully assailed in a judicial tribunal for unreasonableness when it has been adopted by express authority of the Legislature without conflict with any constitutional prohibition or fundamental principles.

SAME.—*Ordinance.—Slaughterhouse.*—An ordinance prohibiting the maintenance of any slaughterhouse within the city when authorized by statute cannot be defeated by the courts on the ground that it is unreasonable.

SAME.—*Ordinance.—Slaughterhouse.*—The necessity or expediency of prohibiting slaughterhouses in a city is implied from an ordinance making that prohibition, without any provision for investigation into the character or condition of the slaughterhouses.

From the Vanderburgh Circuit Court.

J. T. Walker and *P. W. Frey*, for appellant.

G. A. Cunningham, for appellee.

JORDAN, J.—Appellant was prosecuted and convicted of having on the 4th day of June, 1894, violated the provisions of an ordinance of the city of Evansville, adopted Dec. 19, 1892, entitled an ordinance prohibiting the slaughtering of animals and the maintaining of slaughterhouses within the city. Section 1 of this ordinance reads as follows:

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“Section 1. Be it ordained by the common council of the city of Evansville, that after the 1st day of June, 1894, it shall be unlawful to slaughter any animal or to maintain any slaughterhouse within the city of Evansville.”

Section 2 provides a penalty to be assessed for a violation of any of the provisions of the ordinance of not less than \$10.00 nor more than \$100.00.

The evidence in the record establishes that the appellant, on the date charged in the complaint, was guilty of maintaining a slaughterhouse within the city of Evansville, and was engaged in slaughtering therein beeves, hogs and sheep to supply a meat market, in which business he was engaged.

On the 11th day of February, 1895, counsel for appellant filed a brief, at the close of which it was stated that in the near future they would file an additional one wherein they proposed to argue and present more fully the invalidity of the ordinance. But the record does not disclose the filing of this proposed brief, nor do we find it among the papers in the case, hence are not favored with the benefit of the extended views of counsel for the appellant, or informed what additional propositions, if any, are presented by them, upon the questions involved, except as we ascertain the same from the brief of counsel for the appellee.

Appellant attacks the validity of the ordinance upon the ground that it is unreasonable, and also that it results in taking the property of a person without due process of law, for the reason, as he insists, that it does not provide for any investigation, in the first instance, into the character or condition of the slaughterhouse, in order to determine whether it is offensive and injurious to the public health or comfort sufficient to constitute it a nuisance. And it is further contended that the Legislature cannot authorize a

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city to prohibit the slaughtering of animals within its limits. It is also insisted that conceding that the appellee was empowered to prohibit the maintaining of a slaughterhouse within its corporate limits, the ordinance in question was repealed by the act of 1893.

The charter of the city of Evansville in force at the time the ordinance in question was enacted, in the enumeration of the powers conferred upon the common council, provided as follows:

“Eighth. To direct the location of all powder-houses, slaughterhouses, tallow chandler’s shops, soap factories, distilleries and all other houses, factories and shops that may detract from the comfort of the inhabitants of the city. And if thought necessary, to prohibit altogether the erection or continuance of all or any of such shops, factories, houses and establishments within the limits of said city.”

See Local Acts 1846-47 of the general assembly, p. 13. The twentieth clause of the same section provides as follows:

“Twentieth. To abate and remove nuisances, and to declare what shall be deemed nuisances, and punishing by suitable penalties the person or persons causing or continuing the same, or suffering the same to remain on his, her or their premises, or both abate and punish, at discretion; and for the purpose of declaring what shall be deemed nuisances, and abating the same or causing and compelling the same to be abated, and punishing persons for causing, continuing or suffering the same as aforesaid, the common council shall have jurisdiction over both land and water one mile beyond the limits of the city in all directions.”

On March 3, 1893, the Legislature of this State passed an act concerning the incorporation and government of cities having a population of more than

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50,000 and less than 100,000, whereby the charter of appellee under which the ordinance in controversy was adopted, was expressly repealed. Acts 1893, p. 65. The city of Evansville was operating under this latter act at the time the appellant was charged with the offense of which he was convicted. Section 1 of this act is as follows: .

“All by-laws, ordinances and regulations, not inconsistent with this act shall remain and continue in full force until altered and repealed by the common council in conformity with the provisions of this act, but all by-laws, ordinances and regulations inconsistent with this act are hereby abolished.”

Section 23 thereof, in enumerating the powers granted to the common council, has the following provisions:

“To declare what shall constitute a nuisance, to prevent the same, require its abatement, authorize the removal of the same by the proper officers, and provide for the punishment of the person or persons causing the same, continuing or suffering the same to exist, and assess the expenses of its removal against such person or persons, and to provide for collecting such expenses either by placing the same on tax duplicate or by suit.”

Also the following:

“To prohibit or regulate the location and management of starch factories, glue factories, renderies, tallow candleries, bone factories, soap factories, tanneries, slaughterhouses, breweries, distilleries, livery stables, foundries, and all other establishments of which the business or trade may become noxious or injurious to the public comfort or health; to prohibit the erection of such buildings or the continuance of such noxious or injurious occupations therein whenever the public comfort or health requires it.”

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It is well settled that when the adoption of a municipal ordinance or by-law is expressly authorized by the Legislature, and when the express grant of power is not in conflict with a constitutional prohibition or fundamental principles, it cannot be successfully assailed as unreasonable in a judicial tribunal. *Coal Float v. City of Jeffersonville*, 112 Ind. 15; *Skaggs v. City of Martinsville*, 140 Ind. 476, and cases there cited; *Rund v. Town of Fowler*, 142 Ind. 214. By the charter of 1847, in clause 8, of the enumerated powers conferred upon the city of Evansville, as above set out, the right to direct the location of slaughterhouses, or, if deemed necessary, to prohibit entirely the erection or continuance thereof within the limits of the city, is expressly granted to the common council, and these same powers are likewise granted under the act of 1893.

It is evident, we think, from an inspection of the provisions of the act of 1893, as herein set forth, that there is nothing in them,—neither is there anything otherwise in the act, with which the ordinance in controversy can be said to be inconsistent; consequently, it cannot be held to be abolished by the latter act, but as therein declared it “shall remain and continue in full force until altered and repealed by the common council,” etc.

Slaughterhouses have been subject to government control through the agencies of towns and cities, both in this country and Europe, for a long period of time, upon the grounds that such control was necessary to promote cleanliness, and to protect the health and comfort of the inhabitants of such municipalities. The adoption of laws relative to the regulation or prohibition of the business of slaughtering animals within reasonable limits, is generally considered as a proper

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exercise of what is termed the police power of the State. This court, in the appeal of *Rund v. Town of Fowler, supra*, considered and upheld an ordinance of a character similar to the one before us. The court, in that case, said: "The penalty from which the appeal is prosecuted is for maintaining a slaughterhouse within the town limits. As we have said, the right to direct the location of such houses is given by the letter of the legislative grant, and the penalty is assessed for the failure to obey the direction that such houses shall not be located within the corporate limits." The grant to the appellee under her charter in regard to her right to legislate upon the subject of slaughterhouses is in its terms broader than is the right given to towns to legislate upon the same subject. In the case of the former, it is a two-fold grant. First, to direct the location of such houses. Second, to prohibit altogether their erection or continuance within the city limits. That the Legislature of the State had the authority to expressly confer this power upon the common council, in view of the many judicial interpretations of such legislative warrant, cannot now be successfully controverted. That the common council of appellee, in the enactment of the ordinance in question, properly and reasonably exercised the power granted to it under the charter, is equally as well settled. An act of the Legislature of the State of California, incorporating the city of Sacramento, granted power to the board of trustees to pass ordinances to control and regulate slaughterhouses, or provide for their exclusion from the city limits or any part thereof. In pursuance of this grant the city adopted an ordinance which declared it to be unlawful for any person to slaughter any animal within the city, or to erect, maintain, or use, etc., within the city, any house or

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building as a slaughterhouse, or to dress or clean any slaughtered animal therein.

In the appeal of *Ex parte Heilbron*, 65 Cal. 609, the validity of this ordinance was sustained by the Supreme Court of that State. See authorities there cited.

The following authorities also sustain the validity of the ordinance. Dillon Munic. Corp. section 141; Tiedeman Munic. Corp. section 118; 2 Kent Com. 340; *Cronin v. People, etc.*, 82 N. Y. 318; *Metropolitan Board of Health v. Heister*, 37 N. Y. 661; *Village of Buffalo v. Webster*, 10 Wend. 100.

In the *Slaughterhouse Cases*, 16 Wall. 63, Miller, Justice, speaking for the court, after defining the police power, said: "The regulation of the place and manner of conducting the slaughtering of animals and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power."

By some of the courts a slaughtering establishment has been held to be a nuisance *per se*; while by others it has been regarded as *prima facie* a nuisance; and where it exists so near to dwelling houses as to impair the comfortable enjoyment of the dwellers therein, an actionable nuisance is created. But this question does not arise in the case at bar, and we need not inquire as to the manner in which appellant maintained his slaughterhouse. It is sufficient for the purpose of this appeal for the court to know that he was engaged in a business subject to legislative control, and that the power relative to such control was legally lodged in the common council, and by it properly and rightfully exercised. The contention that this ordinance punishes the prohibited act without re-

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gard to any proof that the slaughterhouse in question was injurious to the health and comfort of the inhabitants of the city is without force. It was not essentially necessary to its validity for the council to allege or explain the reason for its enactment or the exigencies out of which it arose. It is an elementary rule that legislative bodies within their power, in the enactment of laws, may judge of the necessity, or the expediency therefor, and the exercise of that judgment is to be implied from the law itself. We again affirm that the passage of the ordinance was clearly within the authority expressly granted by the charter to appellee.

As to whether the slaughtering of a single animal by a person within the city for meat for his own consumption, would come within the inhibition of the ordinance, is not a question before us, and we are not therefore required to decide it. It follows that the ordinance is not open to the objections interposed by the appellant and the judgment is affirmed.

Filed January 7, 1896; petition for rehearing overruled April 24, 1896.

No. 17,681.

THE STATE v. ARNOLD.

APPEAL.—By State.—Payment of Fine and Costs.—The payment by defendant to the clerk of the fine and costs imposed on him does not estop the State from taking an appeal as provided by section 1955, R. S. 1894, upon a question reserved by it.

SAME.—Criminal Law.—Right of Appeal by State. —Acquittal.—An acquittal is a condition of the right of appeal upon a reserved question conferred upon the State by section 1955, R. S. 1894, as section 1915 provides that the prosecuting attorney

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may except to any opinion of the court and reserve a point of law for the decision of the supreme court, and, in case of reversal, take the reserved case to the Supreme Court, and section 1956 provides that the clerk below must certify the judgment of acquittal.

CRIMINAL LAW.—*Verdict Assessing Less than Minimum Imprisonment.*—That a verdict assesses less than the minimum of imprisonment authorized by statute, does not render it void, and the defendant waives the irregularity by failing to object at the proper time.

SAME.—*Arrest of Judgment.*—Mere defects or uncertainties in a criminal pleading, or the imperfect statement of an essential element of a public offense in an indictment therefor, will not sustain a motion in arrest of judgment.

JUDGMENT.—*Arrest Of.—What Amounts to.*—The sustaining of an objection by defendant to judgment upon the part of the verdict affixing imprisonment as a part of the punishment is an arrest of judgment within section 1955, R. S. 1894, providing that the State may appeal to the supreme court upon an order of the court arresting the judgment, although the motion was not based upon any of the statutory causes for arrest of judgment.

From the Whitley Circuit Court.

W. A. Ketcham, Attorney-General. *W. A. Glatte*, Prosecuting Attorney, *I. W. Leonard*, *T. R. Marshall*, *W. F. McNagney* and *T. H. Clugston*, for State.

H. S. Biggs, *L. W. Royse* and *A. A. Adams*, for appellee.

HACKNEY, C. J.—The appellee was charged in the lower court, by indictment in two counts, under section 2260, R. S. 1894 (section 2139, R. S. 1881), with the crime of conspiring with other persons named to obtain money by false pretense. At the trial, the court charged the jury that if the defendant should be found guilty as charged in the second count of the indictment the punishment prescribed was imprisonment in State's prison not more than seven years nor less than one year, and a fine in a sum not exceeding \$1,000.00 nor less than \$10.00. The verdict of the jury found

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the appellee guilty as charged in the second count and affixed his punishment at imprisonment in the State's prison for the term of one year and a fine in the sum of \$25.00. The verdict further found the appellee not guilty as charged in the first count.

It is conceded by appellee's counsel that the punishment prescribed for the offense charged in the second count of the indictment was by a fine not to exceed \$5,000.00 nor less than \$25.00 and imprisonment in the State's prison for a term not exceeding fourteen years nor less than two years. Over the objection and exception of the appellant the court rendered judgment against the appellee for \$25.00 and the costs of the prosecution, and sustained the appellee's written objection to judgment upon that part of the verdict affixing imprisonment as a part of the punishment. A motion by the appellee for a new trial was withdrawn over the appellant's objection; a motion by the appellant to subject the appellee to another trial was denied, and other steps were taken, none of which do we regard as necessary to a decision of the case. The bill of exceptions presents the case upon reserved questions, and discloses that when the verdict was returned there was no objection or exception made to it by the appellee or his counsel.

The first inquiry arising in the case is upon the appellee's motion to dismiss the appeal for the alleged reason that an appeal was not authorized by the statute, there having been no acquittal of the appellee, and because of the payment of the judgment rendered on the verdict. Section 1915, R. S. 1894 (section 1846, R. S. 1881), is as follows: "The prosecuting attorney may except to any opinion of the court during the prosecution of any cause, and reserve the point of law for the decision of the Supreme Court. The bill of exceptions must state clearly so much of the record and pro-

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ceedings as may be necessary for a fair statement of the question reserved. In case of the acquittal of the defendant, the prosecuting attorney may take the reserved case to the Supreme Court upon an appeal at any time within one year. The Supreme Court is not authorized to reverse the judgment upon such appeal, but only to pronounce an opinion upon the correctness of the decision of the court below. The opinion of the Supreme Court shall be binding upon the inferior courts, and shall be a uniform rule of decision therein. When the decision of the court below is decided to be erroneous, the appellee must pay the costs of the appeal."

Section 1955, R. S. 1894 (section 1882, R. S. 1881), is as follows: "Appeals to the Supreme Court may be taken by the State in the following cases, and no other:

"First. Upon a judgment for the defendant, on quashing or setting aside an indictment or information.

"Second. Upon an order of the court arresting the judgment.'

"Third. Upon a question reserved by the State."

Section 1956, R. S. 1894 (section 1883, R. S. 1881), is as follows: "In case of an appeal from a question reserved on the part of the State, it shall not be necessary for the clerk of the court below to certify, in the transcript, any part of the proceedings and record except the bill of exceptions and the judgment of acquittal. When the question reserved is defectively stated, the Supreme Court may direct any part of the proceedings and record to be certified to them."

These statutes, it is urged, deny the right of the State to appeal in other instances than those enumerated, and this we have no doubt is correct, as shown by the cases cited to that proposition. *State v. Bart-*

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lett, 9 Ind. 569; *State v. Hamilton*, 62 Ind. 409; *State v. Hollowell*, 91 Ind. 376; *State v. Evansville, etc., R. R. Co.*, 107 Ind. 581. Such instances, briefly stated, are: "upon reserved question, in case of acquittal;" "upon judgment for the defendant, on quashing or setting aside an information or indictment;" and "upon an order of the court arresting the judgment." The verdict in the present case was one of conviction and not of acquittal. The error in the verdict was in assessing a punishment less than that prescribed by the statute. Regarding this error, for the purposes of the present question, as against the appellee rather than in his favor, how was he privileged to take advantage of the error? But three ways, under our practice, were open to him: 1st, a motion for a new trial; 2d, a motion for a *venire de novo*; and 3d, a motion in arrest of judgment. Any one of these permitted an adjudication of his rights without a complete miscarriage of justice. It is true that each had its objection, from his standpoint, as it made it possible for him to be again put upon trial for the offense charged. He did not avail himself of the first or the second remedy, and, no doubt, avoided the third as far as possible. But to have avoided it entirely was to invent a remedy unknown to the practice and rules of procedure. The remedy employed was to object to the rendition of judgment. Not for the statutory reasons: want of authority in the grand jury or that the indictment stated no public offense (R. S. 1894, section 1912), nor, indeed, for any stated reason. Nevertheless the purpose and effect of the remedy was to arrest the judgment. It is provided by R. S. 1894, section 1919, that "After verdict of guilty, or finding of the court against the defendant, if judgment be not arrested or a new trial granted, the court must pronounce judgment." The

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appellee waived the right to a new trial by withdrawing his motion therefor, and the only remaining step in denial of the right and duty of the court under the above statute was to arrest the judgment. This step was taken. It will not be an answer to this conclusion to say that the indictment was not bad and that the grand jury had authority to inquire into the offense. If the appellee attained the end wrongfully or without the sanction of the statute, that fact is no answer to the conclusion that the end was accomplished. The arrest of a judgment is simply to stay the rendition of judgment. The phrase as employed regarding appeals has no technical meaning, and the words of the statute (R. S. 1894, section 1955), "upon an order of the court arresting the judgment," do not necessarily imply the arrest of the judgment correctly and for the causes alone that are specified in section 1912, *supra*. Such an implication would rest upon the false proposition that the defendant could not give a reason for the arrest, except such as is given in the statute, and that the court could not incorrectly sustain such a reason.

It was certainly never contemplated that one convicted of a crime might employ unauthorized methods of procedure by which he could stay the rendition of judgment and at the same time say, "I will not suffer the penalty of the crime, yet, since I was not acquitted, the State is remediless." If this proceeding were possible, a verdict of conviction would become an empty ceremony and the rights of the State would be disposed of upon the inventions by counsel of new methods of practice. If a part of the necessary judgment may be defeated by such practice, all of it may be defeated. The ends of justice may not be defeated by novel methods of practice, instituted by one found guilty of crime, and simply by asserting that such

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methods were unauthorized. The error of the court invited by the defendant cannot be asserted by the defendant in denial of the rights of the State. We conclude that the objection, by the appellee, to judgment upon the verdict can only be considered as the equivalent of a motion in arrest. The action of the court in response to said objection must be treated as an order in arrest.

The payment by the appellee, of the amount of the fine and costs, was only what he was obliged to do. It was his own act and by it he cannot prejudice the State. No officer of the State charged with any duty in connection with the prosecution of this appeal has done an act to estop the State to continue its appeal. The receipt of the amount of the fine and costs by the clerk was not an act of the State or its officers in charge of the appeal inconsistent with the prosecution of the appeal. The prosecuting attorney, whose fee in the prosecution below was paid to him, whether the present incumbent in the office of prosecutor or not, is not charged with the duty of prosecuting this appeal. That duty rests upon the Attorney-General.

The instances where the State may be estopped are very rare, and certainly never where the alleged act of estoppel is by one not charged with any duty in respect to the matter to be affected by the estoppel. It was held in *State v. Tait*, 22 Iowa, 140, that the acceptance of a fine does not preclude an appeal by the State. The motion of the appellee to dismiss this appeal is, therefore, overruled.

The only question remaining is as to the assigned error of the court in so arresting judgment. This question might be answered by suggesting that the procedure adopted was not authorized by the statute, and, if it had been, it was not supported by any statutory

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cause for arresting judgment. Upon the return of the verdict, the appellee having failed to seek a new trial, and his proceeding to arrest the judgment having been without statutory support, it was the duty of the trial court, under section 1919, *supra*, to enter judgment. We might leave the question at this point. However, further answering counsel, we will say we do not regard the verdict as void in whole or in part. While as to the element of imprisonment it was not that which the law directed, that fact resulted from an error of law committed by the trial court in erroneously instructing the jury that the minimum imprisonment was one year instead of two years. That error, if prejudicial to the appellee, could be made available only by some proper steps on his behalf. It was the direct result of misdirection to the jury, and that misdirection was an error open to attack by the appellee as other errors in instructions. If an error of the same character had resulted in a verdict of imprisonment in excess of the maximum punishment prescribed, that error should not result in the complete failure of justice which would result from holding the verdict void. Any verdict resulting from a misdirection by the court is available error, but it is too much to say that it is void. Whether such an error might become available, is a question depending upon the action of the defendant. If he does not choose to avail himself of it, the consequences fall upon him, and the failure does not add invalidity to the error. The fact that to have availed himself, in this case, of the motion for a new trial or for a *venire de novo*, it would have subjected him to another trial, does not lend strength to the claim that the verdict was void and not erroneous simply. In their contention that the verdict as to the element of imprisonment was void, the appellee's

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learned counsel insist that it became so because it was outside of statutory authority. Many cases are cited and considered by counsel, but, in our opinion, the decisions of this court in principle determine this question.

Less than the statutory punishment has uniformly been held by this court not to be outside the statute, and as sufficient to support a judgment. *Griffith v. State*, 36 Ind. 406; *Shafer v. State*, 74 Ind. 90; *Kennegar v. State*, 120 Ind. 176; *Harrod v. Dismore*, 127 Ind. 338; *Nichols v. State*, 127 Ind. 406; *May v. State*, 140 Ind. 88.

The case of *Wentworth v. Alexander*, 66 Ind. 39, upon the question before the court, is not in conflict with the cases just cited. There was a prosecution for murder in the second degree, the verdict found the defendants guilty and affixed their punishment at two years' imprisonment, less than authorized by statute, and the case cited was for the discharge of the defendants upon the writ of *habeas corpus*. They had moved for their discharge in the principal case, and upon the overruling of that motion they moved for a *venire de novo*, which was sustained. This court held that they were not entitled to be discharged upon the writ of *habeas corpus*, but it was suggested, upon a divided opinion, that the petitioners had been in jeopardy by the prosecution. This suggestion was not only foreign to the case in hand, but it was probably incorrect, and was certainly so if the first conviction was vacated at the instance of the defendants. *Hoskins v. State*, 27 Ind. 470; *Commonwealth v. Hatton*, 3 Grat. 623; *Joy v. State*, 14 Ind. 139; *State v. Oliver*, 39 La. An. 470; 11 Am. and Eng. Ency. of Law, 960, 961; Bishop Crim. Proced., section 842; *Sanders v. State*, 85 Ind. 318; *Veatch v. State*, 60 Ind. 291.

If, as we have seen, the assessment of punishment

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less than that prescribed does not render the verdict invalid, and if it permits judgment to the extent assessed by the verdict, though an entire element of punishment may be omitted, there is no reason for the variation of that rule because the omission is of a portion of the time of imprisonment prescribed by the statute. It is true that there are decisions by courts of high authority which refuse to recognize the validity of any punishment not within the letter of the statute, though that assessed is less than the minimum prescribed. To adopt the rule of those cases would require the reversal of the unbroken line of cases of this court. This we would be slow to do, not only to maintain the precedents in their full force and value, but we believe them to be sound. We had occasion in the recent case of *May v. State, supra*, to consider the effect of a defendant's silence when a verdict is returned assessing punishment smaller than that prescribed, and we have no reason to deny the soundness of the conclusion there reached. His silence is a waiver of the irregularity. As ridiculous as it might appear that a defendant charged with crime should be required to object to an irregularity favorable to him, it is no more so than to permit him, after receiving the benefit of a diminished punishment, to ask that, by reason of that benefit, he be permitted to go scot-free.

The judgment of the circuit court is reversed, with instructions to render judgment upon the verdict as to the element of imprisonment therein.

Filed February 22, 1896.

ON PETITION FOR REHEARING.

HACKNEY, C. J.—Counsel for appellee have supported their petition for a rehearing by an earnest and able brief, presenting again all of the questions con-

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sidered originally and adding an attack upon the indictment.

Counsel expressly recognize the rule that a rehearing is never granted that points may be presented for the first time. Accepting, for the purpose of the attack, the court's conclusion that the motion of the appellee that judgment be not rendered against him, as a motion in arrest of judgment, it is insisted that the question of the sufficiency of the indictment to charge a public offense was made. It may well be doubted, we think, if that question is presented any more than that the grand jury had no authority or any other reason not stated in the motion. However, the attack made upon the indictment is that it insufficiently charges the persons to be defrauded and the persons whose money was sought to be obtained, and did not "negative the averments as to the alleged false representations." The charge was that the appellee and others conspired, etc., "to defraud divers citizens of the county of Whitley, and the public generally," and to fraudulently, etc., "obtain from divers citizens of the county of Whitley by means of said false pretenses and misrepresentations," which were then set out. While not passing upon the question, it may be well to note the cases of *Woodworth v. State*, 43 N. E. Rep. 933; *Chandler v. State*, 141 Ind. 106; *Campton v. State*, 140 Ind. 442; *Nichols v. State*, 127 Ind. 406, where it is held that mere defects or uncertainties in criminal pleading or the imperfect statement of an essential element of a public offense will not sustain a motion in arrest of judgment.

We have again investigated the questions originally presented, and find no reason to change our views expressed in the former opinion.

The petition is overruled.

Filed April 24, 1896.

No. 17,722.

GILLILAND ET AL. v. JONES, EXECUTOR.

FRAUDULENT CONVEYANCE.—*Voluntary Grantee.*—*Cannot Hold as Against Subsequent or Existing Creditors.*—The rule that a voluntary grantee cannot hold against creditors of a grantor, although he possessed no knowledge of the grantor's fraudulent intent to cheat, hinder or delay such creditors, applies to subsequent as well as existing creditors.

PLEADING.—*Sustaining Demurrer to Complaint.*—*Action to Set Aside Fraudulent Conveyance.*—*Grantee's Knowledge of Fraudulent Intent.*—Improperly sustaining a demurrer to an original complaint in an action by a creditor to set aside a voluntary conveyance by his debtor, as fraudulent, because it fails to allege that the grantee had knowledge of the fraudulent intent, is not prejudicial, where, upon a trial under an additional paragraph of the complaint subsequently filed supplying such averment, it was specially found that the grantor did not make the conveyance with fraudulent intent, in view of section 401, R. S. 1894, providing that the court must in every stage of the action disregard any error not affecting a substantial right.

APPELLATE PROCEDURE.—*Demurrer.*—*Special Findings.*—The supreme court may look to the special finding of facts in order to determine whether the ruling on a demurrer was prejudicial to the complaining party.

From the Marion Superior Court.

H. J. Milligan, for appellants.

Knefler & Berryhill, for appellee.

HACKNEY, C. J.—This was a suit by the appellee to set aside as fraudulent a conveyance of real estate made to the appellants, it was alleged, as volunteers. The lower court, in special term, sustained a demurrer to the original complaint, consisting of a single paragraph; thereupon the appellee filed an additional

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paragraph of complaint, upon which issue was joined and a trial had, resulting in a special finding, with conclusions of law and a decree in favor of the appellants. From that decree there was an appeal to the general term of said court, where the decree was reversed for error in sustaining said demurrer. From that reversal the appellants have appealed to this court. The question for decision by this court is, therefore, as to the sufficiency of said complaint.

The appellee's claim arose subsequent to the conveyance in question and the complaint contained no allegation that the grantees knew of or participated in the alleged fraudulent intent of the grantor. Counsel for appellants concede the ordinary rule that a voluntary grantee cannot hold against existing creditors, although he possessed no knowledge of the grantor's fraudulent intent to cheat, hinder or delay such creditors, but it is insisted that this rule does not apply to subsequent creditors. To this insistence are cited the cases of *Bishop v. Redmond*, 83 Ind. 157; *Stumph v. Bruner*, 89 Ind. 556; *Plunkett v. Plunkett*, 114 Ind. 484; *Bright v. Bright*, 132 Ind. 56. We have carefully examined these cases and do not find that they lend any support to the proposition here presented. There are expressions in the cases to the effect that the mere want of consideration is not enough, and that there must be some badge of positive fraud. These expressions, however, were not employed with reference to the participancy of the grantee. Nor do we find any decision of this court or any other holding that the voluntary grantee must participate in the fraudulent intention and purpose of the grantor. With reference to existing creditors, the rule is settled in this State that the voluntary grantee takes no valid title as against them, regardless of the question of his knowledge or fraudulent intent. *Milburn v. Phillips*,

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136 Ind. 680; *Roberts v. Farmers, etc., Bank*, 136 Ind. 154; *York v. Rockwood*, 132 Ind. 358; *McAninch v. Dennis*, 123 Ind. 21; *Bishop v. State, ex rel.*, 83 Ind. 67; *McCole v. Loehr*, 79 Ind. 430; *Spaulding v. Blythe*, 73 Ind. 93.

In May Fraud. Conv., section 45, it is said: "In cases of voluntary conveyances it matters not whether or not the donee had knowledge or notice of the fraudulent intent, for they are not within the exception in favor of *bona fide* purchasers by persons 'not having, at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud or collusion.' Where the conveyance is *voluntary* it is the motive of the giver, not the knowledge of the acceptor, that is to weigh; for volunteers cannot be said to be injured by the gift to them being defeated; * * they are only deprived of a gain to which others had a better right." In Bump Fraud. Conv., pp. 267, 268 (3d Ed.), it is said: "If there is an actual intent to hinder, delay, or defraud creditors, on the part of the grantor, then the law relating to fraudulent conveyances, as distinguished from mere voluntary conveyances, is applicable. It follows from the definition of a voluntary conveyance that the question in regard to its validity or invalidity depends upon the intent of the party making it, and not on the motive with which it is received. * * * It is the innocent purchaser and not the innocent donee that is protected. The only question is *quo animo* the gift or grant is made. It is the motive of the giver and not the knowledge of the acceptor that is to determine the validity of the transfer. * * * A donee, who sets up a voluntary conveyance when it would, if established, defeat creditors, participates in and carries out the intent of the donor." Again,

on page 272, this author says: "The law stamps a man's generosity with the name of fraud when it prevents him from acting fairly towards his creditors, and presumes fraud if he disables himself from paying his debts. In such cases the presumption of fraud arises and may exist without the imputation of moral turpitude. The principle is that persons must be just before they can be generous, and that debts must be paid before gifts can be made."

Speaking of the English statutes on the subject, and these statutes have frequently been held to have but declared the rules of the common law, the author just quoted says: "The statute embraces not merely conveyances made with intent to delay, hinder or defraud creditors, but conveyances, made to * * defraud others. The word 'others' is inserted to take in all manner of persons, as well creditors after as before the conveyance, whose debts should be defrauded. * * * It is accordingly well settled that if a party makes a conveyance of his property with the express intent to become indebted to another, and to defraud him of his debt by means of this artifice, such subsequent creditor may contest and by proof defeat the transfer, although he was not a creditor of the grantor at the time of the conveyance," p. 315. The rules, and the reason therefor, thus stated, leave no room to distinguish between prior and subsequent creditors as to any requirement that the grantee shall be shown to have acted with knowledge of and participancy in the fraudulent intent of the grantor. Nor do we believe that any such distinction can be sustained upon authority.

The additional paragraph of complaint differed from the original paragraph only in alleging the knowledge of the grantees of the fraudulent intent of the grantor. A fact specially found was that the

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grantor did not make the conveyance with fraudulent intent. From this fact it is urged that the ruling upon demurrer to the original paragraph of complaint was harmless. By section 401, R. S. 1894, it is provided that "The court must, in every stage of the action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." In the presence of the fact so specially found it cannot be doubted that the appellee would have failed upon his original paragraph of complaint. That fact would have defeated his cause of action in whatever form it could have been pleaded, and it was a fact upon which the two paragraphs did not differ. The appellee, as to that fact, was not deprived of any evidence nor misled in any respect by the ruling upon demurrer. If there had been a general finding, we could not know that the appellee's failure was not due to the want of evidence of the participancy of the appellants, grantees, in the alleged fraudulent intent of the grantor. The theory of the court in sustaining the demurrer was that such evidence was necessary, and we would probably be required to presume that the theory thus indicated was followed to the close. But since the appellee did not stand upon the ruling upon demurrer, and availed himself of the privilege of filing an additional paragraph, upon which he failed by reason of a finding which would have been fatal to his cause if the ruling upon demurrer had not been against him, he was certainly not harmed by that ruling. He had, upon the additional paragraph, every opportunity to show a fraudulent intent on the part of said grantor that he could have had upon the original paragraph, or that he could now have if a new trial

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were permitted for the error in sustaining said demurrer.

Counsel for appellee do not advise us in what respect "the substantial rights of" their client are affected by the ruling of which they complain, and we have been unable to discover wherein an injury was done to such rights. It is true that as the record stood when the ruling was made, the error was prejudicial, but, like many errors which may be waived or be cured, it is found that by the subsequent proceedings the appellee had no cause of action. That conclusion was reached upon a pleading filed by the appellee, and after he had received every advantage from the evidence that was open to him under the pleading which had gone down under the demurrer. Having filed an additional paragraph of complaint, the appellee occupied no different position than if he had filed both paragraphs at one time and one paragraph had failed upon demurrer.

The appellee's contention is that this court may not go to the special findings to learn that he was not harmed by the ruling. This contention is not supported by the decisions which hold that where the finding is general the court will not go to the evidence to ascertain whether the party was harmed by an erroneous ruling upon pleadings. One reason for the rule in those cases is that this court does not weigh the evidence; upon this question the trial court has weighed the evidence and has distinctly found that the appellee had no cause of action under the pleading in question. Nor do we think the argument sound that the special finding is in the record only for the purpose of testing the accuracy of the conclusions of law. It is true that one against whom conclusions of law are stated upon a special finding of facts may, upon a motion for a new trial, attack the correctness

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of the facts found, but where that is not done the facts are certainly to be accepted as established for all purposes.

Counsel state their proposition as follows: "But it matters not what is set forth in the special finding of facts, under our practice where a demurrer has been sustained to a good pleading and there is no other paragraph on file at the time, under which the same facts were admissible in evidence, the Supreme Court cannot, by looking at the evidence or finding of the court pronounce the error harmless. See *Moyer v. Brand*, 102 Ind. 301; *New v. Walker*, 108 Ind. 365." In the first of these cases it is said: "The case is before us without the evidence, upon the special finding of facts. We cannot look to this special finding of facts to pronounce the error harmless, on the ground that the case has been disposed of upon its merits. If the answer had been allowed to stand, the evidence might have been different, and hence the special finding might have been different." Here it can be said, as we have already said, that the evidence could not have been different nor could the special finding have been different if the paragraph of complaint in question had remained in the issues. We cannot, therefore, regard that case as an authority here. In *New v. Walker*, *supra*, it is said: "It is contended by the appellee's counsel that there is a special finding showing that the appellant was not a purchaser in good faith, no harm was done her in sustaining a demurrer to the reply. We cannot concur in this view. The decision in *Sohn v. Combern*, 106 Ind. 302, does not sustain the counsel's position. In that case there was no demurrer, but the attack was by the assignment of errors, and, besides, all that was said in that case, which is in any degree revelant to the present sub-

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ject, was addressed to the provisions of section 345 of the code respecting the overruling,—not the sustaining,—of demurrers. It cannot be legally possible that if a party's reply presenting facts which completely avoid and nullify the answer of his adversary, is held to be insufficient, the special finding can cure the error. *If his pleading is overthrown, he is not entitled to give evidence in support of the theory which it asserts, and he is, therefore, necessarily and materially injured by the ruling striking it down.*"

The holding in that case was probably correct with reference to the pleading there in question, and we recognize it as correct in any case where the party cannot or may not give evidence, under other pleadings, of the theory advanced by the pleading to which a demurrer has been sustained. The reason for the holding in the case first cited is stated in the words above italicized, and wherever that reason may obtain we readily concur in the holding of that case. In the case before us the complaining party had another pleading under which evidence was indispensable upon an essential theory of the paragraph which went down. That evidence and that theory were of the essence of the cause of action, and having failed upon it he could not have suffered by the adverse ruling. In *Conley v. Grove*, 124 Ind. 208, the complaint was bad, yet the case was tried upon it, and a correct finding and judgment upon the facts as agreed upon. There could be no other finding or judgment except that rendered. No good can be accomplished by reversal of the case, as the same finding and judgment would have to be rendered if the cause were reversed and the complaint amended. The correctness of the facts found in the present case not being questioned, we can say, as was said in the case from which we have just

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quoted, that the judgment upon another trial must be the same. A different result could only come from the possibility of the appellee being able to add to his evidence of fraud on the part of the grantor. In that contingency the harm to the appellee would arise, not from the demurrer, but from the denial of another opportunity to contest the good faith of his adversary.

So in *McComas v. Haas*, 93 Ind. 276, this court looked to the special verdict to ascertain if a ruling upon demurrer to an answer was harmless. So, in *Evansville, etc., Co. v. Maddux*, 134 Ind. 571, this court looked to the special verdict to ascertain if a ruling upon demurrer to a paragraph of complaint was harmless.

In *Olds v. Moderwell*, 87 Ind. 582, this court looked to the answer of the jury to special interrogatories to determine that the sufficiency of an answer was an immaterial question and as disclosing that upon a vital issue the case was properly decided. So, with reference to a special finding, *Walling v. Burgess*, 122 Ind. 299. We take it that where the record affirmatively discloses the presence of an issue irrevocably decided against one who complains of an erroneous ruling, he is not harmed by that ruling if, upon that issue, he must have failed without that error. This conclusion implies, of course, that the complaining party could not have been prejudiced from the want of an opportunity to be heard upon that issue.

The general term of the superior court should have held the error, in sustaining the demurrer, to have been harmless, and should have affirmed the judgment of the special term.

The judgment of the general term is reversed.

Filed May 5, 1896.

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No. 17,296.

THE CITIZENS' STREET RAILROAD COMPANY v. ROBBINS,
ADMINISTRATOR.

CONTRACT.—Deed.—Assumption of Liability.—Maximum Limit.—

Railroad.—A stipulation in a deed of the property of a railroad company to another company, "subject to a certain liability in no event to exceed \$6,000, growing out of a specified suit," constitutes an assumption only of \$6,000 of the claim if the liability exceed that amount, and not of the full liability of the grantor company in such suit.

DAMAGES.—Measure Of.—Conversion of Corporate Stock.—The measure of damages for the conversion of corporate stock is the highest intermediate value between the time of conversion and a reasonable time after the owner has received notice of the conversion, to enable him to replace the stock,—especially where the conversion is not willful and fraudulent, and is without benefit to the party charged therewith.

SAME.—Conversion of Corporate Stock.—Knowledge Of.—Time for Valuation.—The knowledge of conversion of corporate stock for the purpose of fixing a time for its valuation in the assessment of damages, should be that of some one charged with the duty to act, and not interested by reason of participating in the original wrong.

SAME.—Conversion.—Dividends Earned on Stock before Conversion.—Dividends earned upon corporate stock before the date of the technical conversion should, with interest upon them, constitute an element of the damages for the conversion, but those following both the actual and technical conversion cannot be allowed.

SAME.—Measure Of.—Stock of Corporation.—Conversion.—Where stock of a corporation has been converted, the measure of damages is the highest intermediate value of the stock between the time of conversion, and reasonable time after the owner has received notice of the conversion.

SAME.—Corporate Stock.—Conversion Of.—Decedent's Estate.—Time for Valuation.—If corporate stock belonging to an estate has been converted, the knowledge of such conversion, for the purpose of fixing a time for the valuation of such stock, should be that of some one who is charged with a duty to act and who has not participated in the original wrong.

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CONVERSION.—*Corporate Stock.*—*Time for Valuation.*—*Notice.*—*Administrator de Bonis Non.*—Where an administrator *de bonis non*, in an action against the administratrix and a corporation for the conversion of stock owned by the estate, the administratrix having been removed November 21, 1881, made demand for the stock December 21, 1881, and brought suit January 5, 1882, December 2, 1881, was a reasonable time within which to charge plaintiff with knowledge of the conversion for the purpose of fixing a time for the valuation of the stock converted.

SAME.—*Recovery.*—*Administrator de Bonis Non.*—In such case the interest of the administratrix, if any, in the stock converted, is not recoverable by the administrator *de bonis non*.

SAME.—*Measure of Damages.*—*Dividends.*—*Interest.*—Neither dividends accruing nor interest on dividends which have accrued after conversion of stock, can be allowed as elements of damage.

PLEADING.—*Complaint.*—*Theory.*—*To Charge Old Railroad Company with Stock and Extend Charge to New Company.*—*Fraudulent Conveyance.*—That the theory of a complaint against a railroad company is not to set aside a conveyance of stock as fraudulent, but to charge the old company with such stock and dividends accrued thereon, and to extend such charge to the new company which has succeeded to the property rights of the old company, see opinion.

From the Marion Superior Court.

W. H. H. Miller, F. Winter and J. B. Elam, for appellant.

J. M. Butler, S. M. Shepard, R. N. Lamb and R. Hill, for appellee.

HACKNEY, C. J.—This suit was instituted by the appellee, Charles F. Robbins, as administrator *de bonis non* of the estate of Henry H. Catherwood, deceased, and was originally against the Citizens' Street Railway Company and Tom L. Johnson. With the parties as stated, the suit was tried and resulted in a decree against the defendants therein, from which decree there was an appeal to this court, wherein there was a reversal as to said Johnson and an affirmance as to said street railway company. See *Citizens' St. R. W. Co.*

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v. Robbins, Admr., 128 Ind. 449 (12 L. R. A. 498). The basis of the cause of action then and now involved was the fact that in the year 1872 said Catherwood died intestate, the owner of three hundred and eight shares of the capital stock of said railway company, of the par value of \$30,800.00, and of the actual value, at that time, of \$4,520.00, and that his widow, then acting as administratrix of his estate, made to one Carlisle a void sale of said stock; that the purchaser procured a transfer of the certificates of said stock to be made to him by said railway company, said company being chargeable with notice of the invalidity of said sale. Originally Tom L. Johnson was sought to be made liable as the purchaser of said stock from Carlisle. It was held by this court that the sale by the administratrix was void; that the Citizens' Street Railway Company was liable and that Johnson was not liable to the estate.

Upon the return of the case to the trial court the issues were changed by a dismissal as to Johnson, and, by way of supplemental complaint, bringing in as a defendant the appellant, The Citizens' Street Railroad Company.

The theory of the cause of action as stated in each of the paragraphs of complaint, as amended and pending when said supplemental complaint was filed, was to recover said stock in specie, and the amount of the dividends declared upon and accruing to said stock. The supplemental complaint alleged that "on the 24th day of April, 1888, the Citizens' Street Railway Company, being at the time indebted to this plaintiff, as is averred and shown in the original complaint in this cause, did make, execute and deliver to said defendant, The Citizens' Street Railroad Company, a deed of conveyance, selling, assigning," etc., describing all of the

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property of every character belonging to the railway company. The pleading then continues:

"Plaintiff further says that the said conveyance was made without any consideration whatever therefor, to said grantor, and without any authority therefor; that said conveyance left said grantor without any means or property subject to execution, and without sufficient property to pay the claim of this plaintiff.

"Plaintiff further says that the claim of this plaintiff was mentioned and referred to in said deed of conveyance, said property being conveyed, as the language of said deed reads, 'subject to a certain liability, in no event to exceed \$6,000.00, growing out of a suit by the administrator *de bonis non* of *Henry H. Catherwood, deceased, v. Tom L. Johnson and others*; particulars of said liability being fixed by a contract entered into as of this date, between Tom L. Johnson and said Citizens' Street Railroad Company.' But plaintiff says that the amount due and owing to him, from said Citizens' Street Railroad Company,' at time of the said conveyance, and at the present time, largely exceed \$6,000.00, and in fact amounts to more than \$100,000.00; that said conveyance was constructively fraudulent, as against the rights of this plaintiff; that said property and assets of said Citizens' Railway Company, so transferred to said Citizens' Street Railroad Company, were chargeable with the payment of plaintiff's whole claim, and the value of said assets and property so received by said conveyance by said Citizens' Street Railroad Company largely exceeded in value plaintiff's claim, and were in fact worth one million, two hundred thousand dollars (\$1,200,000.00). Plaintiff further says, as he is informed and believes, that said Tom L. Johnson, in said contract in writing, did undertake and agree and

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bound himself to pay the claim of this plaintiff, or so much thereof as might be over and above said \$6,000.00. Plaintiff is unable to attach a copy of said contract as an 'Exhibit' hereto, but will undertake to do so, whenever a copy of the same can be procured from the defendants. Plaintiff says that said contract of said Tom L. Johnson with said Citizens' Street Railroad Company, to pay the plaintiff's claim, ought, in equity, to enure to the benefit of this plaintiff, the consideration for said contract, among other things, being the purchase of the stock of said Tom L. Johnson in said Citizens' Street Railway Company by John C. Shaffer.

"Wherefore, plaintiff prays that the said conveyance to said Citizens' Street Railroad Company of the said property above described, be set aside, and said property be subjected by this court to the payment of this said plaintiff's claim; that the plaintiff be subrogated to all of the rights and benefits growing out of the said contract of the said Tom L. Johnson, assuming and agreeing to pay plaintiff's claim herein.

"Plaintiff further says that, during the pendency of this suit, dividends to a large amount, to-wit: \$100,000.00, have been declared and paid on said stock of the said Henry H. Catherwood, deceased, and the same have been received and paid to the said Tom L. Johnson.

"Wherefore, plaintiff prays judgment for \$100,000, and all other proper relief."

The appellant's learned counsel insist that the allegations of the supplemental complaint, which become a part of the original paragraphs of complaint severally, give to the suit the theory of a proceeding to set aside a conveyance as fraudulent. It is true that it contains allegations proper in such a proceeding; that the conveyance was without consideration and left the

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grantor without means to pay its debts, and the prayer that the conveyance be set aside. These allegations, however, do not consist with the further allegations of an assumption by the purchasing company, both by the deed and by a contract, of at least \$6,000.00 of the debts of the selling company. These alleged assumptions destroy the effect of the allegations of no consideration which gave to the pleading the only possible support upon the appellant's contention. There are no allegations of a combined purpose or intention to defraud the appellee or other creditors. The allegation "That said conveyance was constructively fraudulent as against the rights of this plaintiff," was a conclusion and not a statement of fact. It was a conclusion at variance with the rule that fraud is a question of fact. The allegations of the supplemental complaint must be considered in connection with those of the paragraphs severally of the original complaint. So considering them we are impressed that they were not drawn with a very definite and clearly settled single theory, but we feel satisfied that the principal and most definite theory of the suit was to charge the Citizens' Street Railway Company, primarily, with the stock and its dividends and to extend that charge to the Citizens' Street Railroad Company because of its having succeeded to the property and rights of the railway company, and, in equity, assumed the existing liabilities of that company.

The allegations that the conveyance was made without consideration, and left the railway company without means to pay the appellee's claim; that the railroad company took the conveyance subject to the liability for appellee's claim, not, however, to exceed \$6,000.00, as stipulated in the deed, were facts pertinent to the theory that the railroad company had succeeded to all of the property and rights of the rail-

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way company and with knowledge of the appellee's claim. The allegation of no consideration, so far as it would support the theory of a fraudulent sale, is neutralized by the allegation of an express assumption of \$6,000.00. The allegation that the sale was constructively fraudulent is conceded to give no force to the insistence that the theory of the action is to set aside the conveyance as fraudulent. It is a conclusion, and is contrary to the statutory rule that fraud is a question of fact. Upon the possible theory that it was designed to plead fraud, though there was some consideration for the sale, the failure to allege any fraudulent intent in which both companies participated would defeat that theory.

We are not impressed with the contention of counsel for the appellee that there is any right of recovery as upon an express assumption, by the deed, of the appellee's entire claim. The deed would be the basis of the railroad company's liability, and it is not made a part of the pleading, and, if it were, we cannot agree that it assumes a sum in excess of \$6,000.00. On the contrary, we have no doubt of its effect, so far as the parties to it are concerned, to limit the liability of the company to \$6,000.00. Nor do we concur in the proposition that under the complaint there is any right of recovery, as upon an express contract between Johnson and Shaffer, or Johnson and the railroad company. The terms of that contract are not pleaded, and Johnson, whose liability by that contract is alleged in general terms, is not a party to this action, and just how the appellee may be subrogated to the rights of the railroad company in a liability against Johnson, under this complaint, we are not advised by counsel. Another allegation of the supplemental complaint, that seems to have been made without reference to

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any of the theories suggested, is that general statement that the sale was made without authority.

The sufficiency of the complaint is not questioned, and we do not pass upon it, though we think the theory we have assigned to it is suggested, if not entirely supported, by the following decisions: *Louisville, etc., R. W. Co. v. Boney*, 117 Ind. 501 (3 L. R. A. 435); *Cleveland, etc., R. W. Co. v. Prewitt*, 134 Ind. 557; *Chicago, etc., R. W. Co. v. Hall*, 135 Ind. 91 (23 L. R. A. 231); *Midland R. W. Co. v. Galey*, 141 Ind. 483.

The issue tendered by the complaint was met by a general denial, and a trial resulted in a special finding of fact, with conclusions of law stated and a judgment in favor of the appellee for \$37,220.00.

The facts specially found covered fairly the ownership of the stock by Catherwood, the sale by the administratrix, the circumstances rendering the sale invalid and fixing a liability against the Citizens' Street Railway Company as set forth in the case of *Citizens' Street R. W. Co. v. Robbins, supra*. It was found that the sale to Carlisle was on July 16, 1873; that the stock passed from him to an innocent purchaser February 15, 1878; that a demand was made upon the railway company for the reissue of said stock to the estate November 21, 1881; that the value of the stock on December 2, 1881, at the time this suit was instituted, was 40 cents on the dollar; that, between November 1, 1879 and April 25, 1888, dividends had been declared and paid upon the stock of the railway company, \$16,016.00 of which were declared and paid upon the stock in question, and that on the 24th day of April, 1888, the railroad company succeeded to the property of the railway company with knowledge of the appellee's claim and without leaving the latter company means or property to pay said claim; that "it

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was, in and by the terms of said deed and as a part of the consideration for such transfer, stipulated that said railroad company was to pay and discharge any judgment which this plaintiff might recover herein; but, for its protection, it took from Tom L. Johnson, one of the stockholders of said railway company, a contract requiring him, the said Johnson, to indemnify said railroad company against the amount of the judgment herein in excess of \$6,000.00." It is found, in general terms, that the railroad company assumed all of the obligations of the railway company. There are also numerous facts stated, with reference to the meeting of the stockholders of the railway company, at which the sale was made, but such facts were manifestly not pertinent to the issues. It was found, finally, that a claim for \$10.00, with the costs of administration, has been and is pending against the estate.

The conclusions of law stated are that the sale of the stock was void and its transfer by the company wrongful; that the appellee was entitled to recover "the value of the stock on the 2d day of December, 1881, and dividends and interest thereon," and that the railroad company was liable for the loss occasioned by such sale and transfer of said stock in the sum of \$37,220.00.

Appellee's learned counsel have argued that the stipulation, in the deed to the railroad company, "subject to a certain liability, in no event to exceed six thousand (\$6,000.00), growing out of a suit, now pending in the Supreme Court of Indiana, by the administrator of one *Catherwood v. Tom L. Johnson and the Citizens' Street Railway Company*," was an assumption of the full liability of said railway company to said estate, as if the words "in no event to exceed \$6,000.00" had not been written in the stipulation. This argument is

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supported by the proposition that the companies possessed no power to limit the liability to \$6,000.00. This position necessarily implies that the affirmative words of the stipulation are effective notwithstanding the negative words or those which specify the maximum assumption. We have already indicated our opinion that there is no issue in this case authorizing recovery as upon an express assumption of the amount of the appellee's claim, and the reasons for that conclusion have been stated. If we were in error as to the issue, we should not incline to the contention of counsel in their construction of this stipulation. As an affirmative obligation, it can only be construed as an assumption of \$6,000.00 of the claim if the liability shall be found to be so much.

The judgment of the trial court must find support from other findings than that construing this stipulation, or it must fail.

One contention of the appellants' learned counsel is that in any view of the findings the judgment is excessive. Including the columns of "Interest" and "Totals," the special finding embraces the following table of dividends declared and paid by the railway company upon the amount of stock claimed by the Catherwood estate:

DATE.	PER CENT.	AMOUNT.	INTEREST.	TOTALS.
Nov. 1, 1879,	1	\$ 308.00	\$246.80	\$ 554.80
May 1, 1880,	1	308.00	237.56	545.56
Nov. 1, "	4	1,232.00	913.32	2,145.32
May 1, 1881,	2	616.00	438.18	1,054.18
Aug. 1, 1881,	2	616.00	428.94	1,044.94
Nov. 1, "	2	616.00	419.70	1,035.70
Feb. 1, 1882,	2	616.00	410.46	1,026.46
May 1, "	2	616.00	401.22	1,017.22
Aug. 1, "	2	616.00	391.98	1,007.98
Nov. 1, "	2	616.00	382.74	998.74

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DATE	PER CENT.	AMOUNT.	INTEREST.	TOTALS.
Feb. 1, 1883,	2	616.00	373.50	989.50
May 1, "	2	616.00	364.26	980.26
Aug. 1, "	2	616.00	355.02	971.02
Nov. 1, "	2	616.00	345.78	961.78
Feb. 1, 1884,	2	616.00	336.54	952.54
May 1, "	2	616.00	327.30	943.30
Aug. 1, "	2	616.00	318.06	934.06
Nov. 1, "	2	616.00	308.82	924.82
Feb. 1, 1885,	2	616.00	299.58	915.58
May 1, "	1	308.00	145.16	453.16
Aug. 1, "	1	308.00	140.54	448.54
Nov. 1, "	1	308.00	135.92	443.92
Feb. 1, 1886,	1	308.00	131.30	439.30
May 1, "	1	308.00	126.68	434.68
Aug. 1, "	1	308.00	122.06	430.06
Nov. 1, "	1	308.00	117.34	425.34
Feb. 1, 1887,	1	308.00	112.72	420.72
May 1, "	1	308.00	107.10	415.10
Aug. 1, "	1	308.00	102.48	410.48
Nov. 1, "	1	308.00	97.86	405.86
Feb. 1, 1888,	1.5	462.00	141.51	603.51
Apr. 25, "	1.5	462.00	135.08	597.08
		\$16.016	\$8,915.51	\$24,931.51

The columns of interest and totals are supplied by the appellee's counsel.

The finding of the court was made March 9, 1893, and the calculations of interest upon the several dividends are from the dates of the dividends respectively to that date.

Upon the theory that the court allowed for the stock 40 per cent. of the face or par value thereof, and that is the only conclusion possible under the findings, that item would be \$12,320.00. At this point counsel

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differ widely in their views as to what additional items entered into the judgment, those for appellant insisting that they were: Interest on stock since Dec. 2, 1881, \$8,330.00; dividends since that date, \$12,320.00, and interest on such dividends to the trial, \$4,250.00. The objection to this theory is that the amount of estimated interest on such dividends is insufficient by nearly \$2,000.00, and, adding these various items, this interest correctly stated, would aggregate \$39,191.00, or a sum in excess of the judgment.

If we deduct the item of interest on the stock (\$8,330.00) the balance of \$30,871.00 would fall far short of the judgment. The value of the stock on December 2, 1881, with the dividends then accrued and interest on both to the date of the trial would amount to but \$26,775.00. If, however, we add to the value of the stock in December, 1881, the dividends accruing from the transfer of the stock to Carlisle to the sale of the property to the railroad company, with interest on such dividends from the date of each dividend to the time of the trial, the sum is practically \$37,220.00, it is \$31.51 in excess of that sum. While the final conclusion of the court is not clearly stated, we are satisfied that it was intended to and the judgment did allow for the value of the stock on December 2, 1881.....\$12,320.00

All dividends after the transfer of the	
stock to Carlisle and before the sale to the	
railroad company.....	16,016.00
Interest on dividends from their accrual to	
the trial.....	8,884.00
	<hr/>
	\$37,220.00

Was this the correct measure of damages? That it is proper to allow all dividends earned before the

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conversion and interest on the sum to the time of the trial we think is not questionable. When did the conversion take place in the transaction here complained of? The demand for a reissue of the stock was on December 2, 1881, but a demand does not necessarily fix the time of conversion. That a demand is made and is refused is but evidence of a conversion. There is no conflict of authority upon this proposition. *Robinson v. Skipworth*, 23 Ind. 311; *Pribble v. Kent*, 10 Ind. 325; *Coffin v. Anderson*, 4 Blackf. 395; *Cunningham v. Baker*, 84 Ind. 597; *Robinson v. Shatzley*, 75 Ind. 461; *Snyder v. Baber*, 74 Ind. 47.

That there was an actual conversion in this case when the stock passed into the hands of an innocent purchaser and beyond the reach of both the estate and the railway company, would seem to be self-evident. This happened, as found by the court specially, on the 15th day of February, 1878. This we do not regard as conclusive as to the time when the valuation shall be placed upon the converted stock, but as the time to which earned dividends may be allowed without doubt, and from which to a subsequent period, to be ascertained, the stock has attained the highest market price. The first declared dividend, as found by the court, was on November 1, 1879, more than a year and a half after the actual conversion. At what time shall the valuation be fixed upon the stock converted? With relation to ordinary commodities or articles not subject to fluctuating valuations like stocks, the valuation is usually made as at the period of conversion. That rule, however, is not, in our judgment, applied generally where the conversion is of stocks, bonds or securities of fluctuating values. There are conflicting decisions as to whether the valuation shall be that prevailing at the time of the actual conversion, or the highest price between the conversion and the demand,

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interest allowed. At the date of the technical conversion, the value of the stock was established and thus the loss was reduced to a cash basis and supplied the principal element of recovery; the stock had, long prior to that date, passed beyond the possibility of return to the estate, and its earning capacity had, so far as the estate was concerned, ceased; indeed, its dividends were continued beyond the actual conversion only because the technical conversion followed that event. The loss of the estate was, therefore, at the date of the suit, reduced to the then existing value of the stock, the dividends then accrued and the interest on such dividends. That loss represented the then existing liability of the railway company, and with the interest accruing thereon to the date of the trial should have been the amount of the judgment:

That is to say: Stock.....	\$12,320.00
Dividends to that date.....	3,696.00
Interest on stock from Dec. 2, 1881, to the trial	8,317.50
Interest on dividends from the date of accrual to the date of the trial.....	2,684.50
<hr/>	
Total	\$27,018.00

These figures may vary slightly from the correct amount for which the judgment should have been given. We do not state them as exact, since we have concluded that judgment should not be directed to be entered upon the special finding. This conclusion is reached from the fact, as stated in the finding, that Mrs. Catherwood, at the time of the transfer of the stock to Carlisle, executed to him an assignment of her individual interest in the stock. This interest should not be recoverable to her benefit, even through the instrumentality of the estate and its administra-

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tion. That proposition is here urged to reduce the judgment in favor of the estate and we should accept that contention if we felt that the question were duly presented by the record. There is no pleading raising that question, and the only finding of fact supplying the basis for that conclusion is that a claim for \$10.00 is pending against the estate, and the costs of administration are unpaid. The suit is primarily in the interest of the estate and it should be made to appear that some part of the recovery would be distributable to Mrs. Catherwood and would not be required to pay the claims of the estate. That there are no claims, valid and not barred by the statute of limitations, we think is not presented for decision.

The judgment of the trial court is reversed, with instructions to grant a new trial.

Filed February 11, 1896; petition for rehearing overruled April 16, 1896.

ON MOTION TO MODIFY MANDATE.

Per Curiam—Lucy D. Phelps, the widow of Henry H. Catherwood, deceased, and formerly administratrix of the estate of said decedent, comes into this court and files her relinquishment to the appellant, of all interest in the judgment herein and the proceeds thereof. Comes also appellee, administrator, and asks to remit all of the judgment by him recovered, excepting the sum of \$18,012.00, which is to constitute the recovery by him on behalf of said estate, freed from any claim upon or interest in such recovery by said widow or her assignee of the stock in question. Said relinquishment and the offer of said administrator are accepted, and the judgment of the lower court is affirmed in the sum of \$18,012.00, upon the entry, within twenty days from this date, of a remittance by said administrator, with the consent of the court having the settlement of said Catherwood estate, of all the judgment recovered, excepting the sum of \$18,012.00.

Filed April 16, 1896.

No. 17,348.

THE PENNSYLVANIA COMPANY v. EBAUGH.

RAILROAD.—*Negligence.*—*Using Cars Having Uneven Couplings or Deadwoods.*—It is not negligence for a railroad company to use cars, whether belonging to it or another company, constructed with uneven couplings or deadwoods.

INSTRUCTIONS TO JURY.—*Railroad.*—*Cars Having Uneven Couplings.*—*Negligence.*—It is error to qualify a requested instruction that it is not negligence for a railroad company to use cars on its railroads and in its yards, the couplings or deadwoods of which are not of

144	687
157	481
144	687
158	208
144	687
159	170

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uniform or equal heights, by the condition that such deadwoods or couplings are in other respects safe appliances, especially where there is no allegation or issue that the couplings or deadwoods are otherwise unsafe.

APPELLATE PROCEDURE.—Instructions.—Refusal to Give.—The several refusals to give instructions asked for as an entirety may be presented to the Appellate Court by several exceptions, and an exception to the refusal to give them as an entirety is not essential.

SAME.—Record.—Evidence.—Filing.—How Shown.—It is not essential to the consideration of the evidence on appeal, that the showing of its filing with the clerk below shall be made by an order-book entry, but such filing may be shown by the certificate of the clerk or by the transcript.

SAME.—Evidence Not All in Record.—An objection that the record on appeal disclosed that not all of the evidence below is incorporated in the bill of exceptions is not supported by a citation of testimony identifying a map not incorporated in the bill, where it is not affirmatively shown that the map was introduced in evidence.

SAME.—Constitutional Question.—The Supreme Court will not pass upon the constitutional validity of an act of the General Assembly, when the case in which it is questioned may be correctly decided without passing upon that question.

From the Marion Circuit Court.

S. O. Pickens, for appellant.

W. V. Rooker, for appellee.

HACKNEY, C. J.—This suit was by the appellee against the appellant, and his complaint consisted of three paragraphs. One paragraph tendered the issue that the appellant had been negligent in requiring the appellee, a brakeman in its employ, to couple two freight cars, not owned upon the road, the drawbars of which were not of uniform standard, but were such that one stood higher than the other, and that said cars were constructed with deadwoods and with floors projecting over the ends of the sills so that when he attempted to make the coupling his arm was caught between the deadwoods and crushed. As pertinent to this issue the appellant requested the trial court to charge the jury that "It was not negligence for the defendant company to use cars on its railroad and in its yards, the couplings or 'deadwoods' of which were not

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of uniform or equal height." This charge was refused, but the court gave, as its own, the following: "4. It is not negligence for the defendant company to use cars on its railroad and in its yards, the couplings or deadwoods of which were out of uniform or equal height, *provided the said deadwoods or couplings were in other respects safe appliances.*"

The question is presented on behalf of the appellant as to the effect of the modification of the rule announced in the charge refused, as we find it in the words above italicized.

The following decisions sustain the rule that it is not negligence for a railway company to use, of its own or those of another company in the regular transportation, cars constructed with uneven couplings or deadwoods. *Michigan, etc., R. R. Co. v. Smithson*, 45 Mich. 212; *Smith v. Potter*, 46 Mich. 258; *Ft. Wayne, etc., R. R. Co. v. Gildersleeve*, 33 Mich. 133; *Huelett v. St. Louis, etc., R. R. Co.*, 67 Mo. 239; *Toledo, etc., R. R. Co. v. Black*, 88 Ill. 112; *Toledo, etc., R. R. Co. v. Asbury, Admx.*, 84 Ill. 429; *Indianapolis, etc., R. R. Co. v. Flannigan*, 77 Ill. 365; *Whitwain v. Wisconsin, etc., R. R. Co.*, 58 Wis. 408; *Kelley v. Abbott*, 63 Wis. 307; *Way v. Illinois, etc., R. R. Co.*, 40 Ia. 341; *Baldwin v. Chicago, etc., R. R. Co.*, 50 Ia. 680; *St. Louis, etc., R. W. Co. v. Higgins*, 44 Ark. 293.

Many of these cases illustrate the impracticability of transferring freight from the car of one company to that of another at each change of railway line or system; the absence of any regulation by which the cars of all lines or systems are required to be of uniform construction and the propriety of the rule which requires the brakeman, whose duty involves the coupling of cars, to increase his care in proportion to the

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necessarily increased dangers from the varied forms of construction as they come under his observation in the course of business. In the case of *Michigan, etc., R. R. Co. v. Smithson, supra*, in an opinion by Judge Cooley, the proposition is made clear that when the course of business brings together two cars of different companies the brakeman must use his own eyes for notice that such cars have deadwoods upon them or that the couplings are not of equal height, and it is there said: "It does not follow that laborers must sacrifice life or limb in order to meet this great public necessity. It is certain that there must be brakemen and switchmen, and that these must be called upon to perform the somewhat hazardous act of coupling cars, and of making up trains of cars of different constructions. But the act is dangerous. First, because inevitable accidents will sometimes occur; and second, because even in the most exposed positions men will sometimes be wanting in ordinary prudence. But when accident or negligence intervenes, any business is dangerous; the difference in danger is only in degree. There are more risks in operating a mill by steam than by water, but this does not prove the use of the steam engine to be negligence in the mill owner. The same remark may be made of different cars; one construction of car may render necessary a higher degree of care in coupling than another calls for; but there is no ground whatever for imputing to this defendant, or any other railroad company, legal negligence for that which was a necessity of its business, and which all persons in its employ must be presumed to have known was a necessity."

In this case, the appellee testified that after he went to work upon the line in question, he learned that "the cars used on that division were equipped with

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deadwood," and that he knew a part, at least, of the Pennsylvania Company's cars were so equipped.

It was also testified by another that the cars which caused the injury did not vary from the general rule; they were the standard cars; the standard Pennsylvania coal cars. And it was testified also by another, that cars with deadwoods such as described were run into Indianapolis on all roads; that they were in use by others than the Pennsylvania Company because they were considered safer by all railroad men; that seventy-five out of one hundred would prefer coupling a car with deadwoods.

The necessities of the position of brakemen and the knowledge possessed by the appellee charged him with the duty of looking for increased hazards and of exercising greater care when cars of different construction were to be coupled.

It should be remembered that the case presents no question of defective construction or of ill repair, it is simply a question of difference in form of construction.

The charge given recognizes the rule that it was not negligence to take the cars upon the road and to place them in the train, and it was, perhaps, needless that we should have said so much in support of that rule, but the words of the charge in italics engraft an unauthorized condition upon the rule. There was no allegation or issue that the "couplings or deadwoods" were unsafe otherwise than by the form of construction. The charge directed the jury that the appellant was not negligent in using cars with uneven couplings or deadwoods, "provided said deadwoods or couplings were in other respects safe appliances." Giving the proviso its natural and necessary force it not only introduced a condition to the rule of non-negligence, which condition was unauthorized by any issue, but it required more of the appellant than the law would

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have required if the appliances named had been alleged otherwise unsafe. It is a matter of common knowledge that the coupling of freight cars is at best a very hazardous act; that if the buffers and draw-heads are not uneven the task involves a high degree of care to avoid the necessary dangers, and that no practicable system of coupling freight cars with safety to the person making the coupling has been devised. The obligation of railway companies is to use ordinary care to supply reasonably safe appliances for coupling, and they are not required to furnish safe appliances where, from the nature of the business, safety is not possible. Nor are they required to provide the best or the most approved or any particular design of appliances. *Lakeshore, etc., R. W. Co. v. McCormick*, 74 Ind. 440; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Jenney Electric, etc., Co. v. Murphy*, 115 Ind. 566, and cases cited above.

In the first of the cases just cited it was said: "The master's obligation is not to supply the servant with absolutely safe machinery, or with any particular kind of machinery; but his obligation is to use ordinary and reasonable care not to subject the servant to extraordinary or unreasonable danger. When a master employs a servant to do a particular kind of work, with particular kind of implements and machinery, the master does not agree that the implements and machinery are free from danger in their use, but he agrees that such implements and machinery, to be used by such servant, are sound and fit for the purpose intended, so far as ordinary care and prudence can discover." As we have already seen, the question here at issue did not involve any inquiry as to an imperfection or danger in the appliances named, excepting in the lack of uniformity in height. Other imperfections in them or dangers in their use were not the subject

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for instruction from the court. The proviso in the instruction given could but suggest that it was indispensable to a freedom from negligence in the use of uneven couplings or deadwoods that they should be otherwise safe appliances. This, in our opinion, was erroneous. In another instruction the court charged generally that the duty of a master towards his servant was to use ordinary care in furnishing reasonably suitable and safe appliances in the service. This general charge does not cure the error of the particular charge either in assuming an issue not made or implying a burden not recognized by the law.

It is objected by the appellee that the instructions asked by the appellant and refused by the court are not in the record for the reason that they were asked as an entirety and there was no exception to the refusal to give them as an entirety. The court's refusal was several, and the appellant's exceptions were several, and the action of the court and the exceptions so taken are brought into the record with reference to the several charges so asked. This practice has never been condemned by this court, and we do not observe its analogy to the practice upon joint exceptions which are sought to be presented severally.

If appellant's instructions were not in the record the error here found is predicated upon the charge given by the court which is not claimed to be out of the record.

It is also complained by the appellee that the evidence is not in the record because no order book entry of its filing with the clerk is disclosed. That it must be filed and that this fact must appear upon the face of the record has been many times decided, but that it must appear from an order book entry is not required. While an order book entry of the filing would verify the fact of filing, it is not required any more than in

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the filing of a complaint. Those things required to be filed with the clerk are shown to have been filed when the clerk certifies to the fact of filing, or the transcript affirmatively discloses the filing.

Objection is made that the record discloses that all of the evidence given upon the trial was not incorporated in the bill of exceptions and, therefore, that we should not consider the evidence. In support of this objection counsel cites two offers, by him made in the lower court, to prove, in blank. The omissions are not of evidence and the blanks carry the assumption that the offers were never completed. In further support of this objection counsel cites testimony identifying a map as that of the locality of the accident. It is not there disclosed that the map was introduced in evidence, and its identification and proof of its correctness does not establish the introduction of the map in evidence against the judge's certificate that the bill of exceptions contains all of the evidence.

Questions have been argued orally and by elaborate briefs as to the constitutionality of the "Employer's Liability Act," Acts 1893, p. 294. The liability of the appellant under said act was probably not in question under two of the three paragraphs of complaint, and was certainly not involved in the ruling upon which we have declared error.

It is not the practice, and it may be doubted if it is the privilege, of this court to pass upon the constitutional validity of an act of the general assembly when the case in which that validity is questioned may be correctly decided without passing upon that question. *Henderson, Aud., v. State, ex rel.*, 137 Ind. 552 (24 L. R. A. 469), and cases cited.

The judgment of the lower court is reversed, with instructions to grant a new trial.

Filed May 6, 1896.

Stroble v. The City of New Albany.

No. 17,534.

144	695
165	112

STROBLE v. THE CITY OF NEW ALBANY.

PRACTICE.—*Motion for Direction of Verdict.*—*Insufficiency of Evidence.*—The proper practice for a defendant, who is of the opinion that plaintiff's evidence makes no case, is not to move to withdraw the case from the jury, but to ask for direction of a verdict.

SAME.—*Taking Case from Jury.*—*Question of Negligence in Dispute.*—An action for injuries occasioned by a defective bridge should not be taken from the jury, where both the questions of negligence and contributory negligence are left in dispute.

From the Clark Circuit Court.

M. Z. Stannard, C. L. Jewett and H. E. Jewett, for appellant.

G. H. Voight and E. B. Stotsenburg, for appellee.

HOWARD, J.—This was an action brought by appellant for injuries occasioned by a defective bridge maintained by appellee upon a public street of said city.

After the cause had been submitted to a jury and the evidence of appellant heard, the appellee moved the court "to withdraw the cause from the jury and find for the defendant, and render judgment in favor of the defendant;" which motion, over the objection of the appellant, was sustained. Thereupon the court found for the appellee, and rendered judgment on such finding.

In *Engrer v. Ohio, etc., R. W. Co.*, 142 Ind. 618, this court, following *City of Plymouth v. Milner*, 117 Ind. 324, held that the proper practice under circumstances such as we are considering, if the defendant thought the plaintiff's evidence made no case against it, was, not to move the court to withdraw the case

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from the jury, but to ask that the court direct the jury to return a verdict for the defendant.

But in the Engrer case an examination of the evidence showed that the plaintiff was guilty of contributory negligence and could not, therefore, in any event, recover, so that the error of the court in withdrawing the case from the jury was harmless. Following that ruling it will therefore be necessary, in order to know whether the action of the court in this case was harmless or not, to examine the evidence and see whether it shows negligence on the part of appellee and contributory negligence on the part of appellant.

The evidence shows that after dark, on the evening of the accident, the appellant drove upon the bridge from the north and towards the business center of the city; that when he reached near to the south end of the bridge his horse came against a barricade or obstruction placed across the bridge, and began backing away, turning off or lunging partly to the right, when the left hind wheel of the buggy went over the east side of the bridge, from which the guard rails had been removed or suffered to decay, and the appellant fell out and down upon a rocky bottom, twenty-five or thirty feet below, breaking his leg and causing other injuries; that about two months previous the bridge, which was old and out of repair, had been in part closed to vehicles by placing the obstruction across the south end, leaving a passageway for pedestrians. Whether there had been at any time a guard thrown across the north end of the bridge to prevent or warn travelers from entering there, is left somewhat uncertain by the evidence; but there is no question that at the time of the accident, and for a long time previous, there was no such obstruction to travel across that end of the bridge. That there had at one time been guards at each side of the bridge, but for a

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long time they had been in part suffered to fall into decay; and a part of the guard rail on the east side, where the buggy went off, had been removed by the street commissioner to be used as a guard at another point on the street. There is much conflict in the evidence as to whether there was a light some distance north of the north end of the bridge, and between the bridge and a slough or wash-out that crossed the street at that point, and over which, the evidence seems to show, there was some kind of a plankway or crossing. Several of the witnesses testified that such a light, being a lamp with a red flannel bound around it, was fastened to a post three or four feet high, standing a few feet on the west side of the street and near the wash-out, and, as different witnesses testified, from 8 or 10 to 18 or 20 feet north of the bridge; other witnesses say 8 or 10 feet west of the traveled part of the street and 20 or 30 feet north of the bridge. Other witnesses say that there was such a lamp, that some nights it was lit and at other times it was not. Other witnesses, again, who crossed the bridge morning and evening, never saw any light. Then there was evidence of a heavy growth of weeds about the lamp that almost wholly obstructed the light to one coming on the bridge from the north. A witness testified that one familiar with the locality would notice the light, but one unacquainted with the place would pass the light without seeing it. Another witness who crossed the bridge frequently at night said that sometimes you could not see the light at all, and at other times you could; the average height of the weeds around the lamp was four feet, while the height of the lamp, as he testified, was three feet; he crossed the bridge early on the evening of the accident, which was August 29, but saw no light. A witness who went to the scene of the accident, and who arrived before appellant had

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been brought up from the place where he fell, testified that there was nothing to prevent anyone from driving upon the bridge from the north side; he also testified that he saw no light on that occasion. One of the city fire department who had answered the call to go to the help of appellant on the occasion of the accident, found him on the dry rocky bed of the creek where he fell when his buggy tipped over the east edge of the bridge. The distance below was 25 or 30 feet; there was a guard rail for about half-way on that side of the bridge, but none at the place where appellant's wheel went over and he fell from the bridge. This witness saw no light on the bridge or in the vicinity. Appellant himself testified that he drove upon the bridge from the north side; he did not know of any obstruction; the bridge was open, so far as he could see, just the same as it had been the last time he crossed, which was four or five months previous; he saw no light on this occasion; his horse was gentle and under full control. The first warning he had of the obstruction at the south end of the bridge was when his horse stopped and began backing, and the left hind wheel went over the edge on the east side.

It does not seem to us that the contributory negligence of the appellant is so obvious from the evidence, a part of which we have referred to, that the court ought to have directed a verdict against him. We think it was preeminently a case where the question as to the negligence of the city and the contributory negligence of the appellant should have been left to the decision of the jury.

It is true, that where the facts are undisputed, and where only one inference can be reasonably drawn from such facts, the question of negligence may be determined by the court as one purely of law.

But, as said in *City of Franklin v. Harter*, 127 Ind.

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446, "As the question in cases where a municipal corporation is sought to be held liable for injuries caused by a defect in a street is one of negligence, it is seldom that the court can determine the question as one of law, for in by far the greater number of cases the question is a complex one, in which matters of law blend with matters of fact. In all such cases the duty of the court is to instruct the jury as to the law, and that of the jury is to determine whether, under the law as declared by the court, there is actually negligence. Nor does this general rule fail in all cases where the facts are undisputed, since the rule has long been settled in this State that where an inference of negligence may or may not be reasonably drawn from admitted facts, the case is ordinarily for the jury under proper instructions."

The case at bar goes further; for here the facts, not only as to the contributory negligence of the appellant, but also as to the negligence of the appellee city, as detailed in the evidence, are left in dispute. We think the case should not have been taken from the jury.

The judgment is reversed, with instructions to grant a new trial.

Filed January 29, 1896; petition for rehearing overruled May 6, 1896.

Wilson et al. v. Covault, Sheriff, et al.

No. 17,479.

JANAGIN v. COVAULT, SHERIFF, ET AL.

No. 17,480.

WILCOXON v. COVAULT, SHERIFF, ET AL.

No. 17,481.

KLUGH v. COVAULT, SHERIFF, ET AL.

No. 17,482.

BARNES ET AL. v. COVAULT, SHERIFF, ET AL.

No. 17,483.

VANCE v. COVAULT, SHERIFF, ET AL.

No. 17,484.

DAVIS v. COVAULT, SHERIFF, ET AL.

No. 17,485.

LOCK ET AL. v. COVAULT, SHERIFF, ET AL.

No. 17,486.

CONSTANT ET AL. v. COVAULT, SHERIFF, ET AL.

No. 17,487.

WILSON ET AL. v. COVAULT, SHERIFF, ET AL.

From the Blackford Circuit Court.

Elliott & Elliott, Gregory & Silverburg and J. N. Templar & Son,
for appellants.

HOWARD, J.—The questions for consideration in each of the nine preceding cases are in all respects the same as those considered in the case of *Shrack v. Covault, Sheriff*, 144 Ind, 260. On the authority of that case, therefore, the restraining order heretofore issued by this court is dissolved, and the judgment entered in each of the foregoing cases is affirmed.

Filed March 11, 1896.

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6. *Double District.* — Double districts in which two or more counties are grouped and given a voice in the election of more than one senator or representative when neither of them has a voting population equal to the ratio for one senator or representative cannot be created under our State Const., article 4, section 5, requiring apportionment among counties according to the male inhabitants above twenty-one years of age, and section 6 providing that where more than one county shall constitute a district they must be contiguous. *Ib.*
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Ransbottom v. State, 250
2. *Absent Witness.—Evidence.—Subpoena.*—An affidavit for a continuance, on the ground of the absence of a witness, is not required to show that the sheriff, in serving the subpoena, left the same at the residence of the witness, the latter not being found. *Ib.*
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1. *Corporate Stock. — Time for Valuation. — Notice. — Administrator de Bonis Non.* — Where an administrator *de bonis non*, in an action against the administratrix and a corporation for the conversion of stock owned by the estate, the administratrix having been removed November 21, 1881, made demand for the stock December 21, 1881, and brought suit January 5, 1882, December 2, 1881, was a reasonable time within which to charge plaintiff with knowledge of the conversion for the purpose of fixing a time for the valuation of the stock converted. *Citizens' St. R. R. Co. v. Robbins, Admr., 671*
2. *Recovery. — Administrator de Bonis Non.* — In such case the interest of the administratrix, if any, in the stock converted, is not recoverable by the administrator *de bonis non*. *Ib.*
3. *Measure of Damages. — Dividends. — Interest.* — Neither dividends accruing nor interest on dividends which have accrued after conversion of stock, can be allowed as elements of damage. *Ib.*

CONVEYANCE.

See FRAUDULENT CONVEYANCE; HUSBAND AND WIFE.

Husband to Wife. — Consideration. — Subjecting Wife's Inchoate Interest to Mortgage Lien.—The execution of a mortgage by a wife with her husband, by which her inchoate interest in the mortgaged land becomes subject to the lien thereof, is a sufficient consideration for a conveyance by him to her of other property.

Merchants', etc., Assn. v. Scanlan, 11

CORPORATE STOCK.

See CONVERSION, 1; DAMAGES, 4, 5, 6, 7, 8.

1. *Obligation Incurred by President.—Liability.—Agency.*—A corporation is liable on obligations incurred by its president, without direct authority, either by virtue of his office or by express sanction of the board of directors, where he is held out by the managers in the general course of business as having such authority. (See note at end of opinion.)

Evansville Pub. Hall Co. v. Bank of Commerce, 34

2. *Note by One Corporation in Favor of Another. — Common Directors.*—A note made by one corporation in favor of another is not invalid merely because the two corporations have common directors, where it represents a debt justly owing from the maker to the payee. *Ib.*

COUNTY.

See EVIDENCE, 26; PAYMENT.

Court House. — Lease of Rooms for Private Purposes.—A lease of rooms in a court house to be used for private purposes cannot be lawfully made by county commissioners in the absence of statutory authority. *State, ex rel., v. Hart, 107*

COUNTY ASSESSOR.

See WITNESS, 2.

COUNTY AUDITOR.

See CONTRACT, 4.

COUNTY BUSINESS.

See COURTS, 3.

COUNTY COMMISSIONERS.

See APPELLATE PROCEDURE, 3; EVIDENCE, 26.

1. *Allowing Unlawful Claim.—County Not Liable.*—The board of county commissioners cannot bind the county by allowing and ordering to be paid an unlawful claim. *Board, etc., v. Heaston, 583*
2. *Allowance an Administrative Act. — Res Adjudicata.*—The allowance of a claim against a county by the board of county commissioners, is an act by it in its administrative capacity, and is not conclusive as a judicial determination, under section 7830, R. S. 1894, making it a duty of such board to "allow all amounts chargeable" against the county. *Ib.*

COURT HOUSE.

See COUNTY.

COURTS.

See APPORTIONMENT LAW, 1, 4; STATUTE CONSTRUED; SUPERIOR COURT.

1. *Place of Holding Court. — Constitutional Law.* — A statute creating a court for three designated counties, in two of which the sessions are held in different places from those in which the circuit court is held, is not invalid merely because of the inconvenience of having two courts in a county holding their sessions at different places in the absence of any constitutional prohibition in that respect. *Woods v. McCoy, 316*
2. *Place of Holding Court. — Away from County Seat.* — An act requiring a court created thereby for three designated counties, to be held away from the county seat, is not void merely because a law, as previously interpreted, requires the courts to be held at the county seats. *Ib.*
3. *Constitutional Law. — County Business. — Local Law.* — A statute creating a court for three designated counties is not an act regulating county or township business, within the State Const., article 4, section 22, prohibiting the passage of any special or local act on such matters *Ib.*
4. *Concurrent Jurisdiction. — Local Legislation. — Separate Courts. — Constitutional Law.* — A statute creating a court for three designated counties, and giving it concurrent jurisdiction with the circuit court in specified civil offenses and over misdemeanors, and providing for separate jury commissioners and for changes of venue applicable to such court alone, is not a law providing for the punishment of crimes and misdemeanors, or for changing the venue in civil cases, within the State Const., article 4, section 22, prohibiting the passage of any local act on such subjects. *Ib.*
5. *Stare Decisis. — Maxim.* — The rule of *stare decisis* does not bind the court in deciding the constitutionality of a statute where no property right or contract between the parties is involved. *Denney v. State, ex rel., 503*

CRIMINAL LAW.

See APPELLATE PROCEDURE, 27, 28, 38, 54; BILL OF EXCEPTIONS, 1; CHANGE OF VENUE, 8; CONTINUANCE, 8, 6; EVIDENCE, 18; INDICTMENT; NEW TRIAL, 5, 6; TRIAL, 1, 2, 3; WAREHOUSEMAN, 3.

1. *Affidavit and Information. — Quashing. — Title of Cause. — Name of Court.* — An irregularity in an information in failing to give the title of the cause and the name of the court, as required by section 1800, R. S. 1894, is not fatal, under section 1825, providing that no information shall be set aside for mistake in the name of the court or county in the title, or any other defect which does not tend to prejudice defendant's substantial rights upon the merits. *Rivers v. State, 16*
2. *Affidavit, Sufficiency Of. — Crime, Where Committed.* — An affidavit in the caption of which a given county and State are named, which refers to the "county and State aforesaid," and charges that defendant did "then and there, at and in said county," commit a given crime, sufficiently charges that the crime was committed in such county. *Ib.*
3. *Affidavit and Information.* — An information need not state that it was filed when the grand jury was not in session, nor that it had been discharged, under section 1802, R. S. 1894, provid-

ing that the information need not show the reasons for not prosecuting by indictment. *Wright v. State*, 210

4. *Affidavit and Information. — When May be Filed.* — It is not necessary that the court be actually opened for the transaction of business at the filing of an information, under section 1748, R. S. 1894, providing that a public offense may be prosecuted by information, where the party charged is not already under indictment therefor, and the court is in session and the grand jury has been discharged for the term, but it is sufficient if it is filed with the clerk at any time after the commencement of a term, and before its final adjournment. *Masterson v. State*, 240
5. *Perjury. — Indictment. — Oath.* — An indictment or information for perjury need not expressly allege authority in the officer who administered the oath to defendant to administer the same, where the facts alleged show that he had such authority. *Ib.*
6. *Rape.—Resistance.*—Actual physical resistance is not essential to the crime of rape, where such resistance was prevented by fear produced by the defendant's threats. *Ransbottom v. State*, 250
7. *Failure to Record Indictment.—Appeal.*—The failure to comply with section 1741, R. S. 1894, requiring indictments to be recorded, does not injure a defendant who is tried on the indictment that is actually returned by the grand jury. *Ib.*
8. *Warehouseman. — Statute Construed. — Affidavit and Information.* — A prosecution of a warehouseman for selling or removing from his control goods for which he has given a receipt, without the written consent of the holder thereof, in violation of sections 8726-8728, R. S. 1894, providing that one who violates any of its provisions shall be deemed a "cheat and swindler, and subject to indictment," may be, by affidavit and information, under section 1748, providing that all public offenses, except "treason and murder," may, in certain cases, be prosecuted in that manner as well as by indictment. *Miller v. State*, 402
9. *Rape. — Prosecution by Information.* — One may be prosecuted for rape by affidavit and information, although a grand jury had been in session since his arrest and had been discharged without indicting him, under R. S. 1894, section 1748, subd. 1, authorizing a prosecution in that manner for all public offenses, except treason and murder, where the court is in session and the grand jury is not in session, or has been discharged. *Lankford v. State*, 428
10. *Prosecution by Information. — Plea in Abatement. — Case Overruled.*—A plea in abatement to a criminal charge prosecuted by affidavit and information, alleging that there was a grand jury regularly drawn, and that the grand jury had not been discharged for the term when the affidavit and information were filed, is insufficient under R. S. 1894, section 1748, authorizing a prosecution in that manner, "where the grand jury is not in session, or has been discharged." (*State v. Boswell*, 104 Ind. 541, overruled.) *Ib.*
11. *Information.—Plea in Abatement.*—A plea in abatement of a criminal charge by affidavit and information must negative all the provisions of the statute authorizing a prosecution of the offense in that manner. *Ib.*
12. *Verdict Assessing Less than Minimum Imprisonment.*—That a verdict assesses less than the minimum of imprisonment authorized by statute, does not render it void, and the defendant waives the irregularity by failing to object at the proper time. *State v. Arnold*, 651

18. *Arrest of Judgment.* — Mere defects or uncertainties in a criminal pleading, or the imperfect statement of an essential element of a public offense in an indictment therefor, will not sustain a motion in arrest of judgment. *Ib.*

DAMAGES.

See ACTION; APPELLATE PROCEDURE, 5, 47; CONVERSION, 8; EVIDENCE, 15, 16; NATURAL GAS, 1; PLEADING, 4, 5.

1. *Measure Of. — Wrongful Killing of Horses. — Evidence.* — The measure of damages for the wrongful killing of horses fitted for a special kind of work, is the market-value in the locality of horses fitted for such work, if there is such a market-value, and not the general market-value of horses. *Loesch v. Koehler, 278*
2. *Death by Wrongful Act. — Contributory Negligence. — Burden of Proof. — Court Directing Verdict.* — A verdict is properly directed for defendant in an action for negligently causing the death of plaintiff's intestate, where there is no evidence that the intestate was free from contributory negligence, although there is no evidence of negligence on his part contributing to the accident. *Kauffman, Admr., v. Cleveland, etc., R. W. Co., 456*
3. *Breach of Contract. — Sale of State Bonds. — Resale.* — Damages for the breach of a contract for the sale of bonds do not include the profit lost by inability, by reason of the breach, to fulfill a contract for the resale of the bonds at an advance, in the absence of any notice to or knowledge by the party in default of the contemplated resale, but the measure of damages is the increase in the market value of the bonds at the time of such breach. *Coffin v. State, 578*
4. *Measure Of. — Conversion of Corporate Stock.* — The measure of damages for the conversion of corporate stock is the highest intermediate value between the time of conversion and a reasonable time after the owner has received notice of the conversion, to enable him to replace the stock,—especially where the conversion is not willful and fraudulent, and is without benefit to the party charged therewith. *Citizens' St. R. R. Co. v. Robbins, Admr., 671*
5. *Conversion of Corporate Stock. — Knowledge Of. — Time for Valuation.* — The knowledge of conversion of corporate stock for the purpose of fixing a time for its valuation in the assessment of damages, should be that of some one charged with the duty to act, and not interested by reason of participating in the original wrong. *Ib.*
6. *Conversion. — Dividends Earned on Stock before Conversion.* — Dividends earned upon corporate stock before the date of the technical conversion, should, with interest upon them, constitute an element of the damages for the conversion, but those following both the actual and technical conversion cannot be allowed. *Ib.*
7. *Measure Of. — Stock of Corporation. — Conversion.* — Where stock of a corporation has been converted, the measure of damages is the highest intermediate value of the stock between the time of conversion, and reasonable time after the owner has received notice of the conversion. *Ib.*
8. *Corporate Stock. — Conversion Of — Decedent's Estate. — Time for Valuation.* — If corporate stock belonging to an estate has been converted, the knowledge of such conversion, for the purpose of fixing a time for the valuation of such stock, should be that of some one who is charged with a duty to act and who has not participated in the original wrong. *Ib.*

DEBTOR AND CREDITOR.

See FRAUD, 1; FRAUDULENT CONVEYANCE.

DECEDENTS' ESTATES.

See ADMINISTRATOR DE BONIS NON; ADMINISTRATOR'S SALE;
DAMAGES, 8; EVIDENCE, 23.

DEED.

See CONTRACT, 5; CONVEYANCE; EVIDENCE, 4; HUSBAND AND WIFE;
PLEADING, 6.

1. *Construction. — Joint Tenancy. — Tenancy by Entirety. —* Where a deed conveying land to a husband and wife contains the stipulation, "To have and hold the same to the said Samuel Gordon and Phoebe Gordon, his wife, *in joint tenancy*, their heirs and assigns forever," the conveyance vests an estate in joint tenancy in the husband and wife, and they do not hold as tenants by entirety; the latter part of the phrase, "their heirs and assigns forever," being superfluous and in no way affecting the meaning or intent of the grantor. *Wilkins v. Young, 1*
2. *Construction. — No Ambiguity. — Understanding of Parties. —* What the grantor or grantees of a deed understood by the terms of a deed, or in what manner they subsequently treated it, has no bearing on its construction, where there is no ambiguity in the deed. *Ib.*
3. *Description. — Mistake. —* A mistake in a deed in locating the land conveyed in the "northwest quarter" instead of the "northeast quarter" of a given section, will not prevent the title from passing, where there is an additional description by metes and bounds, which furnishes the means of identifying the land conveyed. *Frick v. Godare, 170*

DEMURRER.

See APPELLATE PROCEDURE, 24, 48, 55; PLEADING, 14.

DESCENT.

1. *Childless Second Wife. — Husband's Children by Former Marriage. — Real Estate. —* Land set off to a childless widow, whose husband left children by a former marriage surviving him, upon her refusal to accept the provisions of his will, in accordance with section 2483, R. S. 1881, giving a widow one-third of her husband's real estate, whether he dies testate or intestate, of which she can only be divested by accepting the provisions of his will, descends, upon her death, to such children freed from any provisions of the will, under section 2487, providing that if a man marry a second wife and has no children by her, but has children alive by a previous wife, the land descending to his wife shall, at her death, descend to his children. *Rushton v. Harvey, 382*
2. *Real Estate. — Gift. — When Reverts to Donor. —* That one who has taken possession of land under a contract of purchase, paid the purchase-money therefor, and made valuable improvements thereon, has a deed made by the vendor directly to the former's daughter, in consideration of love and affection, does not deprive him of the benefit of section 2628, R. S. 1894, providing that an estate which has come as a gift to an intestate, who dies without children, shall revert to the donor, saving to the widower his rights therein. *Dotin v. Leonard, 410*

8. *Statute Construed. — Estate by Gift. — Reversion to Donor. —* The provisions of section 2650, R. S. 1894, that where a wife dies intestate without children, but leaving a father or mother, her property shall descend, three-fourths to the widower and one-fourth to the father and mother, or the survivor, provided that the whole shall go to the widower, if the entire amount does not exceed \$1,000, does not apply to land which came to the intestate by gift or in consideration of love and affection, which is governed by section 2628, providing that such land shall revert to the donor on the death of the donee intestate without children, saving to the surviving spouse his rights therein, which is a one-third interest. *Ib.*
4. *Adopted Child. —* An adopted child of a deceased husband, but not of the wife, is not entitled to the protection of section 2641, R. S. 1894, providing that if a widow marry a second time, holding real estate in virtue of a previous marriage, and there be a "child * * * alive by such marriage," the widow cannot, with or without her husband's consent, alienate such land, and upon her death during the marriage it shall go to "her children" by the marriage in virtue of which it came to her, although section 837 provides that an adopted child shall receive all the rights and interest in the estate of the adopting father or mother which a natural heir would be entitled to. *Keith v. Ault, 626*

DESCRIPTION.

See DEED, 8. MECHANIC'S LIEN.

DISCRETION.

See APPELLATE PROCEDURE, 28; CHANGE OF VENUE, 1, 2, 3;
DRAINAGE; EVIDENCE, 2.

DRAINAGE.

See APPELLATE PROCEDURE, 3, 4, 5; BURDEN OF PROOF; JUDGMENT, 8;
VERDICT, 1; WITNESS, 2.

Location of Ditch. — Constructing Diagonally Across Land. — Discretion of Viewers. — A public ditch may be constructed diagonally across land, where it is the most eligible route in the discretion of the viewers, under section 5659, R. S. 1894, requiring the viewers, where it will not be detrimental to the usefulness of the work to locate the ditch on boundary lines, and, so far as practicable, to avoid laying the same diagonally across lands, but not to sacrifice the general utility of the ditch for such purpose.

Wilson v. Talley, 74

ELECTION BY WIDOW.

See EVIDENCE, 23; WILL, 4.

ELECTIONS.

Registration Law, When Unconstitutional. — Imposing Burdens Upon one Class of Citizens not Borne by Others. — A registration law requiring a resident who shall have absented himself from the State for a period of six months or more since last so voting, or who shall have gone into any other State or Sovereignty with the intention of voting therein since last so voting, or during any absence in another State or Sovereignty shall have voted therein since last so voting, and also any person who shall not have been a *bona fide* resident of the county in which he resides at least six

months before any such election, to register in the office of the clerk of the circuit court of the county in which he resides, at least 59 days prior to election, a notice that he claims to be a legal voter of such county, before being entitled to vote, is unconstitutional and void, as being in conflict with sections 2 and 4, of Article 2 of the State constitution relating to qualifications of electors as regards age and residence, as imposing burdens upon one class of citizens not borne by others. *Brewer, Aud. v. McClelland, 423*

ENUMERATION.

See JUDICIAL NOTICE, 2.

EQUITABLE OWNER.

See CHECK.

ESTOPPEL.

See APPELLATE PROCEDURE, 9; APPORTIONMENT LAW, 9; CONTRACT, 2; PLEADING, 1; WAREHOUSEMAN, 1.

1. *Married Woman.—Mortgage.—Tenants by Entireties.—Notice.*—A married woman is not estopped from ascertaining the invalidity, under section 6964, R. S. 1894, of a mortgage given by herself and husband on land owned by them as tenants by entirety, to secure a debt of her husband, by the mere fact that she knew such mortgage was invalid, and failed to notify the mortgagee of the character of her interest in the property. (See note at end of opinion.)

Coats v. Gordon, 19

2. *Husband and Wife.—Mortgage on Wife's Property by Husband.*—A wife is not estopped to deny the validity of a mortgage on a stock of goods owned by her, executed by her husband without her knowledge or consent, by the fact that she permitted him to remain in possession of such goods, purchasing on credit and selling at retail, and that the mortgagee, before obtaining the security, had sold the goods to the husband on credit, believing him to be the owner of the business.

Kiefer v. Klinsick, 46

3. *Heirs Joining in Administrator's Sale of Land.—Life Estate of Widow.*—In a sale of land by an administrator, if the heirs, being the owners of one-third of the land subject to the life estate of the widow, join in the proceedings for the sale and accept the price paid for it by the purchaser, they are thereafter estopped to deny the validity of the sale of the one-third subject to the life estate.

Myers v. Boyd, 496

4. *Reception and Retention of Award in Condemnation Proceedings.*—The reception and retention of an award in condemnation proceedings estops the landholder to deny the validity of the proceedings.

Holland v. Spell, 561

EVIDENCE.

See APPELLATE PROCEDURE, 8, 11, 14, 28, 33, 35, 38, 41, 43, 50, 57, 58; BURDEN OF PROOF; CONTINUANCE, 2; DAMAGES, 1; HARMLESS ERROR, 4, 5; INSTRUCTIONS TO JURY, 9; JUDICIAL NOTICE; NEW TRIAL, 1, 7, 8; PLEADING, 13; PRACTICE, 1; PRESUMPTION; SPECIAL VERDICT, 5; TRIAL, 2; VERDICT, 2; WILL, 2.

1. *Admission of Proceedings of Board of School Trustees.—Parol Testimony.—Appellate Procedure.*—A party cannot object to the admission of the proceedings of a board of school trustees because

- it is merely signed by the secretary, where he has objected to the admission of parol testimony of the contents thereof on the ground that the record is the best evidence. *Alexander v. Johnson*, 82
2. *Competency.—Discretion of Trial Court.*—Whether the record of the transactions of a board of school trustees, signed merely by the secretary, is sufficient to show the making of an alleged illegal contract, is to be determined by the trial court. *Ib.*
 3. *Burden of Proof.—Contract.*—Very slight circumstances will cast the burden of sustaining a contract upon the party asserting its validity, where the other party was old, feeble, illiterate, and weak-minded from sickness or other cause. *Yount v. Yount*, 134
 4. *Parol.—Deed.—Reservation of Life Estate as Security for Contract of Maintenance.*—A reservation of a life estate in a deed may be shown by parol evidence to have been intended merely as security for the performance of the agreement by the grantee to support the grantors during their lives. *Bever v. Bever*, 157
 5. *Burden of Proof.—Impeachment of Marriage.*—The burden is upon a party seeking to impeach a marriage by proof of a former marriage of one of the parties to prove that the former marriage has not been legally dissolved. *Wenning v. Teeple*, 189
 6. *Attorney and Client.*—That a witness has been attorney for a party does not disqualify him to testify as to statements or declarations of the latter, which are not confidential communications made in the course of professional business, under section 505, R. S. 1894. *Harless v. Harless*, 196
 7. *Declarations of Agent Adverse to Principal.*—The declarations of an agent against the interest of his principal, are not inadmissible against the latter because the agent is joined as an adverse party in the action. *Ib.*
 8. *Motion to Strike Out.—When Properly Overruled.*—A motion to strike out all of a witness's testimony is properly overruled, if some part of it is admissible. *Ib.*
 9. *Burden of Proof.—Railroad.—Trespasser.—Authority of Brakeman.*—In an action by a trespasser on a freight train, injured by a brakeman, for damages, the burden is upon the plaintiff to show that the brakeman who inflicted the injury possessed the authority to do the act which resulted in the injury. *Lake Shore, etc., R. W. Co. v. Peterson*, 214
 10. *Authority to Administer Oaths.—Deputy Clerk.*—Evidence that the person who administered the oath to defendant charged with perjury was acting as, and performing the duties of deputy clerk at the time, is sufficient to establish his authority to administer the same. *Masterson v. State*, 240
 11. *Perjury.—Oath.*—It is not necessary to prove that the oath administered to defendant charged with perjury was in writing, where it is not so charged in the information. *Ib.*
 12. *Separation of Jury.*—That some of the jurors during deliberation upon their verdict, accompanied by the officer, visited a water-closet, does not constitute a separation of the jury within the meaning of the statute. *Ib.*
 13. *Rape.—Resistance.*—In determining whether the resistance by the prosecutrix in a prosecution for rape was rendered less effective, or wholly averted by fear, the fact that she had but barely reached the age of consent, and was the only female in a lonely house, surrounded by a trio of strange young men, and had been

brought there under false pretenses practiced on her mother and herself by defendant, are proper matters to be considered.

Ransbottom v. State, 250

14. *Presumption.—Affidavit for Continuance.*—No presumption can be indulged against the truth of the facts stated in an affidavit for a continuance, nor can any presumption be indulged in favor of such an affidavit, where it fails to state a necessary fact, or insufficiently states it. *Ib.*
15. *Damages.—Value of Horses.*—Evidence as to the value of horses, for the special purpose for which they were used, is admissible under an allegation of general damages, in an action for the wrongful killing thereof, as the evidence is of general and not special damages. *Loesch v. Koehler, 278*
16. *Value of Horses for Special Purpose.—Damages.—Harmless Error.*—If the admission of evidence as to the value of the particular horses killed, with reference to their use for a particular kind of work, in an action for the wrongful killing thereof, is erroneous, the error is harmless, where the amount of the verdict is but a fair average of the general market-value of horses, as testified to, and is less than any valuation for the horses, with reference to the special use. *Ib.*
17. *Parol, of Written Lease.*—Parol evidence of the contents of a written lease, sold by plaintiff to defendant, is admissible, where a motion was made by plaintiff to require defendant to produce it, and the affidavit of defendant showed that it was not in its custody. *Lumbert v. Woodard, 335*
18. *Admissions of Defendant in Criminal Case.*—Admission of defendants in a criminal case, which are relevant to the issue, may be given in evidence, whether or not he testifies as a witness. *Hire v. State, 359*
19. *Burden of Proof.—Survey.*—The burden is upon a party attacking a survey by a county surveyor, in this State, to show that it is erroneous. *McGinnis v. Boyd, 393*
20. *Warehouse Receipt.*—A receipt by a warehouseman for a specified quantity of wheat "at stored per bushel, fire and heating at owner's risk," sufficiently shows that the wheat was received by him as a warehouseman for storage, and was not sold to him. *Miller v. State, 401*
21. *Incompetent.—Objection After Admission.—Appellate Procedure.*—An objection to incompetent evidence after its admission, without a motion to strike out the particular matter, will not be considered on appeal. *Lankford v. State, 428*
22. *Objection, When too General.*—An objection to the admission of evidence must specifically designate the particular evidence objected to. *Ib.*
23. *Burden of Proof.—Decedent's Estate.—Widow's Rights.—Election.*—One seeking to subject all of a testator's land to payment of his debts on the ground that the widow did not elect to take under the law within a year as required by section 2666, R. S. 1894, has the burden of proving such fact. *Archibald v. Long, Exr., 451*
24. *Burden of Proof.—Will, Testamentary Capacity.*—Plaintiff in an action to set aside a will on the ground of the testamentary incapacity of the testator has the burden of proving such incapacity. *Blough v. Parry, 463*

25. *Admission.—Decree and Papers in Former Suit.—Trespass.—*The papers and decree in an injunction proceeding, to restrain the entry of a tract of land for the extension of a given street, in which plaintiff in his reply alleges that it was agreed upon between himself and the town treasurer, that he would accept the amount of the award, and open such street when the right of way over adjoining land was procured, and that such condition had not been complied with, are admissible against the plaintiff therein as an admission of the receipt of the money and the condition on which he held it, in a subsequent action by him for trespass for destroying his fences on such land after the right of way over the adjoining land had been procured. *Holland v. Spell, 561*
26. *Burden of Proof.—County.—Recovery of Illegal Claim Ordered Paid.—*The burden is on the county, in an action to recover a claim ordered paid by the board of county commissioners, to show that the claim was not a legal charge against the county. *Board, etc., v. Heaston, 583*
27. *Disputed Signature.—*It is not error to allow counsel on the cross-examination of a witness who has testified to the genuineness of a disputed signature, to put into the hands of the witness for comparison signatures of the same person to papers properly in the record, as it is not necessary that such papers should first be put in evidence. *Tucker v. Hyatt, 635*
28. *Handwriting.—Opinion.—*The mere fact that a witness as to the genuineness of handwriting has only seen the person write since the beginning of the trial is not enough to render his evidence incompetent. *Ib.*
29. *Genuineness of Disputed Signature.—Comparisons.—Appellate Procedure.—*An objection to the receipt of expert testimony as to the genuineness of a disputed signature, founded on a comparison thereof with signatures of the same person to papers in the cause, on the ground that such signatures have been made since the alleged signature became a matter of controversy, does not suggest the objection that they may have been made in a disguised hand for the purpose of manufacturing evidence; and hence the question as to the admissibility of the testimony over such an objection is not presented on appeal. *Ib.*

EXHIBIT.

See APPELLATE PROCEDURE, 24; PLEADING, 10.

EXPRESS COMPANY.

See TAXES, 4, 7.

FENCE.

See PARTITION FENCE.

FORECLOSURE OF MORTGAGE.

See APPELLATE PROCEDURE, 16, 51; MORTGAGE, 2.

FORFEITURE.

See INSURANCE.

FORMER ADJTDICATION.

See RES ADJUDICATA.

FRAUD.

See APPELLATE PROCEDURE, 51.

1. *Mortgage in Fraud of Creditors.—Not Enforceable.—*One who takes a mortgage on the property of another, as part of a scheme

to aid him in defrauding his creditors, acquires no rights thereunder, even though a consideration was paid therefor.

O'Kane v. Terrell, 599

2. *A Question of Fact.*—Fraud will not be presumed, but must be proved by the party alleging it.

Adams v. Laugel, 608

FRAUDULENT CONVEYANCE.

See PLEADING, 14, 15.

Voluntary Grantee.—*Cannot Hold as Against Subsequent or Existing Creditors.*—The rule that a voluntary grantee cannot hold against creditors of a grantor, although he possessed no knowledge of the grantor's fraudulent intent to cheat, hinder or delay such creditors, applies to subsequent as well as existing creditors.

Gilliland v. Jones, Exr., 662

GIFT.

See DESCENT, 2, 3.

HARMLESS ERROR.

See EVIDENCE, 16.

1. *Ultimate Judgment Right.*—Intervening errors will be deemed harmless, where the ultimate judgment is right.

Wilkins v. Young, 1

2. *Denying Motion to Dissolve Restraining Order.*—Error, if any, in denying a motion to dissolve a restraining order, is harmless where the injunction is made perpetual on a general hearing.

Deweese v. Hutton, 114

3. *Striking Out Interrogatory Filed with Pleading.*—Striking out an interrogatory is harmless, if error, where it was not required to enable the party to adapt his pleadings to the facts of the case, and all the information that could have been obtained thereby is fully supplied by the evidence adduced upon the trial.

Meyer, Admr., v. Manhattan Life Ins. Co., 439

4. *Evidence.*—Admission of evidence upon which the rights of the parties do not in any manner depend, if erroneous, is not available error.

Holland v. Spell, 561

5. *Evidence.*—*Breach of Marriage Contract.*—The admission in an action for breach of promise of marriage, of a decree divorcing plaintiff, if error, is harmless, where plaintiff's competency to enter into the contract in suit is not denied.

Tucker v. Hyatt, 635

HEIRS.

See ESTOPPEL, 3.

HIGHWAY.

See PUBLIC IMPROVEMENT; STREETS.

HUMANE SOCIETY.

See CONSTITUTIONAL LAW, 2.

HUSBAND AND WIFE.

See CONVEYANCE; ESTOPPEL, 2; TRUST; WILL, 3.

1. *Conveyance to Wife by Husband.*—A deed conveying land direct from a husband to his wife, in good faith, for a valuable consideration, is valid in this State.

Merchants', etc., Building Assn. v. Scanlan et. al., 11

2. *Deed from Husband to Wife. — Reformation Of. — Mistake.* — *Description.* — A deed from a husband to his wife, executed in good faith, for a valuable consideration, may be reformed so as to correct a mistake in the description of the property. *Ib.*

INDICTMENT.

See APPELLATE PROCEDURE, 5, 7, 27.

INFORMATION.

See CRIMINAL LAW, 1, 3, 4, 8, 9, 10.

INJUNCTION.

See TAXES, 3.

INSANITY.

See UNSOUNDNESS OF MIND; WITNESS, 1.

INSANITY OF JUROR.

See APPELLATE PROCEDURE, 36.

INSTRUCTIONS TO JURY.

See APPELLATE PROCEDURE, 5, 10, 45, 58.

1. *Joint. — Appellate Procedure.* — To render a specification of error in the giving of several instructions available as a cause for a new trial, all of the instructions named must be incorrect.
Masterson v. State, 240
2. *Special. — Delivery to Court Before Argument.* — A party who desires special instructions to be given by the court must deliver them to the court before the argument to the jury commences, and is not entitled to have any consideration given his instructions offered later.
Ransbottom v. State, 250
3. *Joint Assignment.* — The correctness of any one of the instructions covered by a joint assignment of error, or the incorrectness of any one of the requested instructions covered by a joint assignment to refusals to instruct, renders error in the giving of any particular instruction, or the refusing of any particular request, unavailable on appeal.
Conrad v. State, 290
4. *Not Based on Evidence.* — An instruction is properly refused, where there is no evidence on which to base it.
Miller v. State, 401
5. *Will. — Undue Influence. — Instruction not Based on Evidence Given.* — It is error for the court to instruct the jury as to undue influence in an action contesting the validity of a will, where there was no evidence as to undue influence, and where it does not appear from the record that the instruction was harmless and not misleading.
Blough v. Parry, 463
6. *Testamentary Capacity. — Unsoundness of Mind.* — Instructions which inform the jury that if the testator was a person of unsound mind, even though such unsoundness was so slight that it did not impair his capacity to make an intelligent testamentary disposition of his property, the will was void, are erroneous and harmful.
Ib.
7. *Unsoundness of Mind. — Testamentary Capacity.* — An instruction as to unsoundness of mind, in an action testing the validity of a will, which charges that if the evidence shows that the testator did not possess mind enough to know the extent and value

of his property, the persons who were the natural objects of his bounty and their deserts, and that he had not sufficient memory to retain all these facts long enough to have his will prepared and executed, then he was of unsound mind and the jury should find for plaintiff, is insufficient in not fixing the time of such mental unsoundness at the time of executing the will. *Ib.*

8. *Sanity.—Presumption.—Will.*—In an action testing the validity of a will on the ground of mental unsoundness, an instruction offered to the effect that "every person is presumed to be of sound mind until the contrary is shown," is correct and should have been given, and an instruction "that the burden is on the plaintiffs to show by a fair preponderance, unsoundness of mind," does not cure the error, for the instruction as to burden of proof does not raise a presumption as to sanity in favor of the testator. *Ib.*

9. *When Misleading.—Expert Testimony.—Hypothetical Question.*—An instruction that the value of expert testimony depends on the degree of harmony between the facts stated in the hypothetical questions and those established by the evidence, and upon the skill and capacity of the experts, is misleading where it does not refer to their conduct and actions on the stand, the materiality of the facts assumed, their partiality or impartiality, and other relevant circumstances. *Ib.*

10. *Railroad.—Cars Having Uneven Couplings.—Negligence.*—It is error to qualify a requested instruction that it is not negligence for a railroad company to use cars on its railroads and in its yards, the couplings or deadwoods of which are not of uniform or equal heights, by the condition that such deadwoods or couplings are in other respects safe appliances, especially where there is no allegation or issue that the couplings or deadwoods are otherwise unsafe.

Pennsylvania Co. v. Ebaugh, 687

11. *Erroneous.—When Not Cured.*—An erroneous instruction is not cured by another instruction correctly stating the law, where the first instruction is not withdrawn from the jury.

Wenning v. Teeple, 189

INSURANCE.

Life.—Surrender of Policy Without Demanding Paid-up Policy.—Forfeiture.—No recovery can be had on an insurance policy providing for the issuance of a paid-up policy after payment of three or more premiums, if the insured surrenders his policy before its expiration by nonpayment of a premium, where the insured allowed his policy to lapse by nonpayment of a premium without demanding a paid-up policy.

Meyer, Admr., v. Manhattan Life Ins. Co., 439

INTEREST.

See CONVERSION, 8.

INJUNCTION.

1. *Illegal Contract.—Board of School Trustees.*—That the execution of an illegal contract by a board of school trustees for the payment of money to one of its members would constitute a cause of action upon the bond of such member, does not afford an adequate remedy at law, so as to defeat an action by a taxpayer to enjoin the threatened execution of such contract.

Alexander v. Johnson, 82

2. *Taxpayer, Who is.—Suit to Enjoin Misapplication of Public Funds.*—An owner of property which has been entered for tax-

ation, who is liable to pay the taxes thereon as soon as they are collectible by law, is a taxpayer of a town within the meaning of the statutes permitting an action by a taxpayer to enjoin the misapplication of public funds, although he has not resided long enough in the town to actually pay taxes. *Ib.*

3. *Illegal Contract.—Public Funds.—Board of School Trustees.—When Action Will Lie.*—An action by a taxpayer to enjoin the board of school trustees from executing an illegal contract, providing for the paying out of public funds contrary to law, will lie as soon as the steps necessary to the consummation of such illegal purpose have been taken, and it is not necessary to wait until the board is disbursing the money. *Ib.*
4. *Repair of Bridge.—Illegal Contract.*—One who has contracted with the board of county commissioners for the repair of a specified bridge may be joined with such commissioners in an action to restrain the performance of the contract on the ground that it is illegal. *Deweese v. Hutton, 115*
5. *Illegal Contract.—Bond for Faithful Execution.—Repair of Bridge.*—The giving of a bond for the faithful execution of a contract with the board of county commissioners for repairing a bridge will not prevent an action to restrain the performance of such contract on the ground that it was unlawful. *Ib.*
6. *Nuisance.—Erection of Building.*—The erection of a building which will not of itself constitute a nuisance, will not be enjoined because the use to which it is designed to be put would constitute such a nuisance. *Dalton v. Cleveland, etc., R. W. Co., 121*
7. *Against Enforcement of Judgment.—Collateral Attack.*—A proceeding to enjoin the enforcement of a judgment by execution constitutes a collateral attack thereon, and cannot be maintained on account of errors for irregularities merely. *Shrack v. Covault, 260*

INTERROGATORIES.

See HARMLESS ERROR, 3.

Filed with Pleading.—When Properly Stricken Out.—Interrogatories in respect to some matter of opinion, the legal effect of some written instrument, or asking for a conclusion of law or an opinion of hypothetical questions, or requiring the giving of copies of documents, are properly stricken out.

Meyer, Admr., v. Manhattan Life Ins. Co., 439

ISSUE.

See APPELLATE PROCEDURE, 22; VERDIOT, 1.

JOINT TENANCY.

See DEED, 1; MORTGAGE, 1; WILL, 1.

JUDGE.

See MAXIM.

JUDGMENT.

See APPELLATE PROCEDURE, 6, 10, 13, 20, 26; HARMLESS ERROR, 1; INJUNCTION, 7; PLEADING, 12.

1. *Action to Correct. — Laches.* -- A decree by default quieting plaintiff's title to land, will not be corrected nearly nine years

after its rendition, and nearly four years after the actual facts are learned as against a purchaser in good faith, for value relying upon the decree, on the ground that defendant was wrongly informed by plaintiff's attorney that the complaint did not include any lands belonging to him, where the purchaser had no knowledge that such information had been given, or that it was false and that it does not appear that defendant could not have prevented the procurement of the judgment by the exercise of reasonable diligence.

Majors, Exr., v. Craig, 39

2. A judgment is not binding upon one who was not a party to the action in which it was rendered. *Price v. Gwin, 105*
3. *Collateral Attack. — Drainage.* — That a drainage ditch has not been constructed according to plans and specifications, does not render a judgment foreclosing a ditch lien vulnerable to collateral attack. *Shrack v. Covault, 260*
4. *Res Adjudicata. — Constitutionality of Statute.* — A judgment in an action brought by an individual is not conclusive in a subsequent action to which he is not a party nor even a relator, although both cases turn on the constitutionality of the same statute. *Denney v. State, ex rel., 503*
5. *Arrest Of. — What Amounts to.* — The sustaining of an objection by defendant to judgment upon the part of the verdict affixing imprisonment as a part of the punishment is an arrest of judgment within section 1955, R. S. 1894, providing that the State may appeal to the supreme court upon an order of the court arresting the judgment, although the motion was not based upon any of the statutory causes for arrest of judgment. *State v. Arnold, 651*

JUDGMENT, ARREST OF.

See CRIMINAL LAW, 18.

JUDICIAL NOTICE.

1. *Of Records in Another Case.* — The court can take notice of its own records in another case, either on suggestion of counsel or upon its own motion. *Denney v. State, ex rel., 503*
2. *Of Census or Enumeration. — Legislative District.* — Judicial notice will be taken of a census or other enumeration made under the authority of the State or United States, and also of the location, boundaries and juxtaposition of the several counties of the State. *Ib.*

JURISDICTION.

See COURTS, 4, SUPERIOR COURT, 2.

JUROR.

See APPELLATE PROCEDURE, 36; TRIAL, 8.

JURY.

See EVIDENCE, 12; NEW TRIAL, 4, 5, TRIAL, 1.

LACHES.

See JUDGMENT, 1,

LEASE.

See COUNTY; EVIDENCE, 17.

LICENSE.

1. *Use of Streets.—Market Wagon.—City.—Nonresident.*—A non-resident of a city may be lawfully compelled to pay a license for driving a market wagon upon its streets, when no discrimination is made against him on account of his nonresidence.
Tomlinson v. City of Indianapolis, 142
2. *Toll for Use of Streets.—Vehicle.*—A toll for the use of the streets, instead of a tax on personal property, is imposed by a license fee charged on vehicles. *Ib.*
3. *For Use of Streets.—Vehicle.—Reasonableness of Toll.*—The fact that some revenue arises to a city from fees collected from licenses for the use of streets by vehicles, and that it is applied to the repair of the streets, does not render a license of \$3.00 per year for a one-horse market wagon unreasonable. *Ib.*
4. *Toll for Use of Street.—Vehicle.—Police Power.*—The police power, and not the taxing power, is exercised in licensing the use of vehicles on streets. *Ib.*
5. *Power of City to Exact License for Use of Street.—Vehicle.*—The power to license, and to exact a reasonable license fee, for the use of streets and alleys by vehicles, is within the power of a municipality, under a statute giving power to regulate such use. *Ib.*

LIEN.

See APPELLATE PROCEDURE, 31; MECHANIC'S LIEN; VENDOR'S LIEN.

LIFE ESTATE.

See WILL, 6.

LIFE INSURANCE.

See INSURANCE.

LIMITATION OF ACTIONS.

See STATUTE OF LIMITATIONS.

LOTTERY.

See CONTRACT, 1.

MAINTENANCE.

See EVIDENCE, 4.

MARRIAGE CONTRACT.

See HARMLESS ERROR, 5; PLEADING, 13.

MARRIAGE, IMPEACHMENT OF.

See EVIDENCE, 5.

MARRIED WOMAN.

See ESTOPPEL, 1.

Suretyship.—Mortgage.—A mortgage by a wife of a separate property to secure a debt of her husband, is void, under section 6964, R. S. 1894, as being a contract of suretyship.

Merchants, etc., Assn. v. Scanlan, 11

MASTER AND SERVANT.

See PLEADING, 7.

MAXIM.

See COURTS, 5.

Judge.—No one can be a judge in his own case.

Board, etc., v. Heaston, 583

MECHANIC'S LIEN.

See CONSTITUTIONAL LAW, 1; PLEADING, 2.

1. *For Materials Furnished to Contractor or Subcontractor.*—A lien may be acquired for materials furnished for a building to either a contractor or subcontractor, under section 7255, R. S. 1894, placing them in the same category, so far as the right to acquire a lien is concerned.
Smith v. Newbaur, 95
2. *For Materials Furnished. — Destruction of Building Before Notice.*—The lien on land for materials furnished for use in a building thereon is not lost by the destruction of the building by fire before notice of intention to hold the lien is filed.
Ib.
3. *Notice, Sufficiency Of.—Misdescription.*—A notice of intention to hold a lien for materials used in a building, which describes it as a part of a specified out-lot in "Haney's" addition of out-lots, to a specified town, is sufficient, although the addition is "Henley's," where the location of the building on the specified out-lot in Henley's addition is well known, and the owner knew what property was intended to be described in the notice, under section 7257, R. S. 1894, declaring that any description of the lot from which the land can be identified, will be sufficient.
Ib.
4. *Upon Buildings and Land Constituting a Single Plant.*—A single lien may be had upon all the buildings and land constituting a single plant, for materials used in an improvement relating to all the buildings without specifying the particular buildings upon which the separate portions of the materials were furnished.
Premier Steel Co. v. McElwaine-Richards Co., 614
5. *Time of Filing Lien.—Material Furnished to Several Buildings Constituting a Single Plant.*—Notice of a mechanic's lien is in time, if filed within sixty days after furnishing the last of several lots of material ordered and furnished at different times, where they are all supplied under one contract and used in the repair of several buildings constituting one manufacturing plant.
Ib.
6. *Foreclosure on Property in Hands of a Receiver.*—The permission of a court which has appointed a receiver over property to make him a party defendant to an action in another court to foreclose a mechanic's lien which existed on the property at the time of his appointment is not a relinquishment of control of the property which authorizes a judgment by such other court directing a public sale of the property by the sheriff with clear title to the purchaser.
Ib.

MISCONDUCT OF BAILIFF.

See NEW TRIAL, 4.

MISCONDUCT OF JUROR.

See NEW TRIAL, 6.

MISCONDUCT OF PROSECUTING ATTORNEY.

See APPELLATE PROCEDURE, 44, 45.

MISTAKE OF FACT.

See DEED, 8; HUSBAND AND WIFE.

MORTGAGE.

See AGENCY; CHATTEL MORTGAGE; CONVEYANCE; ESTOPPEL, 2; FORECLOSURE OF MORTGAGE; FRAUD, 1; MARRIED WOMAN; PLEADING, 12.

1. *Joint Tenancy*.—The joint tenant may mortgage his interest in the joint estate in like manner as though he were a tenant in common, and to the extent of the mortgage lien the right of the survivor will be destroyed, and the equity of redemption at the death of the tenant will be all that will fall to the surviving companion.
Wilkins v. Young, 1
2. *Foreclosure.—Reformation*.—A mortgage on land, the description of which is so defective and uncertain that it cannot be reformed in equity, cannot be foreclosed. *Merchants, etc., Assn. v. Scanlan, 11*
3. *Priority of Mortgages.—Street Railroad*.—A mortgage executed by a railroad company upon its railway property alone, will not attach to an electric plant subsequently purchased by the company, so as to take precedence over a mortgage on such plant to the vendor to secure the purchase-price. *Lumbert v. Woodard, 335*
4. *To Indemnify Sureties.—When Action May be Maintained*.—An action to foreclose a mortgage, given to indemnify the mortgagees as sureties for the mortgagor, containing a stipulation that the mortgagor will pay the debts secured, may be maintained as soon as the obligations are due and unpaid without payment of the same by the mortgagees, and compensation for the total probable loss may be recovered as damages. *Goff v. Hedgecock, 415*
5. *Sale of Personalty by Certain Mortgagees, by Agreement of Parties.—Waiver.—Foreclosure as to Realty Covered by Same Mortgage*.—Under a mortgage of both personal and real property, containing no provision as to the possession or sale of the personal property, an agreement between the parties to the mortgage that the personalty should be sold by certain of the mortgagees, and the proceeds applied on the debt which it secured, does not amount to a waiver of the right to foreclose as to the realty, to supply a deficiency remaining after application of the proceeds of the personalty. *Ib.*
6. *Sale of Mortgaged Personalty by Certain Mortgagees.—Compensation for Services*.—If certain of the mortgagees, under a mortgage conferring no right of possession by the mortgagees, or right of sale by them, and by agreement of the other mortgagees and the mortgagor, take possession of and care for and sell the mortgaged personalty, they are entitled, as against their co-mortgagees, to a reasonable compensation for such services out of the proceeds of sale. *Ib.*
7. *When Not Void.—No Consideration for Notes Secured by Mortgage*.—A mortgage is not rendered void *per se* simply because one of several notes, which it is given to secure, is not supported by a consideration, where there was no fraudulent intent in its execution. *Adams v. Laugel, 608*

MUNICIPAL CORPORATION.

1. *City.—Void Contract.—Street Lights*.—A contract for street lights for five years, at a certain price per light per year, payable monthly,

made by the executive department of public works, when no appropriation for the purpose had been made except for a month or two in advance, is void, where the statute provides that no executive department shall bind the city by a contract, agreement, or in any way to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose, and that all contracts and agreements, expressed or implied, and all obligations of any and every sort beyond such existing appropriations, are absolutely void.

City of Indianapolis v. Wann, 175

2. *City.—Void Contract.—Subsequent Appropriation.—Ratification.*—Subsequent appropriations for installments coming due on a contract made by city authorities in violation of a statute prohibiting contracts, for which appropriations had not already been made, cannot operate as a ratification of the contract so as to make it binding. *Ib.*
3. *Nunc Pro Tunc Entry.—Report of Assessment of Benefits and Damages.*—A town may order the entry *nunc pro tunc* of the report of assessors of benefits and damages caused the property of a designated person by the opening of a street, which has been inadvertently omitted from the records. *Holland v. Spell*, 561
4. *Ordinance.—Unreasonableness.*—An ordinance cannot be successfully assailed in a judicial tribunal for unreasonableness when it has been adopted by express authority of the Legislature without conflict with any constitutional prohibition or fundamental principles. *Beiling v. City of Evansville*, 644
5. *Ordinance.—Slaughterhouse*—An ordinance prohibiting the maintenance of any slaughterhouse within the city when authorized by statute cannot be defeated by the courts on the ground that it is unreasonable. *Ib.*
6. *Ordinance.—Slaughterhouse.*—The necessity or expediency of prohibiting slaughterhouses in a city is implied from an ordinance making that prohibition, without any provision for investigation into the character or condition of the slaughterhouses. *Ib.*

NATURAL GAS.

1. *Damages.—Explosion.—Leak in Main.*—The destruction of a building by the explosion of natural gas which escaped from a leak in a high-pressure main 80 or 90 feet distant across a street, and reached the building by penetrating the soil under its frozen surface, renders the gas company liable, where it had made no effort to prevent the leak, although this had continued for several years, and notice of the fact had been given to line-walkers. (See note at end of opinion.) *Consumers Gas Trust Co. v. Perrego*, 350
2. *Notice.—Leak in Main.*—Ample notice of a leak in a high-pressure main of natural gas is given to the owner of the main by a continuance of the leak for several years, and also direct information given to line-walkers. *Ib.*

NEGLIGENCE.

See CONTRIBUTORY NEGLIGENCE; DAMAGES, 2; INSTRUCTIONS TO JURY, 10; PRACTICE, 2; RAILROAD, 5.

NEW TRIAL.

See APPELLATE PROCEDURE, 15, 21, 35, 46.

1. *Insufficiency of Evidence.* — The trial judge should set aside a verdict and grant a new trial, where a verdict is returned which is unwarranted by the evidence.
Rarick v. Ulmer, by Next Friend, 25
2. *As of Right. — Writ of Assistance.* — A motion or petition for a writ of assistance for the possession of land, is not such an action as entitles a party to a new trial as matter of right, under section 1076, R. S. 1894.
Gilliland v. Milligan, 154
3. *A Cause, if Tried Anew, Must Be on Same Theory.* — A case cannot be tried upon one theory, and, when defeated, obtain a new trial upon a different theory.
Lake Shore, etc., R. W. Co. v. Peterson, 214
4. *Misconduct of Bailiff. — Jury.* — The misconduct of the bailiff, in charge of a jury in a criminal case, in permitting some of the jurors to talk with different persons during an intermission, after the court had given part of its charge, does not entitle defendant to a new trial, where it appears by the affidavit of defendant's attorney that nothing was said concerning the cause of the trial, and that all the conversation took place in the presence of the bailiff, specially where it does not appear that such misconduct was not known to defendant before the jury retired to consider their verdict.
Masterson v. State, 240
5. *Separation of Jury. — Criminal Law.* — A new trial will not be granted in a criminal case because of a separation of the jury without leave of the court, after they had retired to deliberate upon their verdict, in violation of the statute, if the verdict appears clearly to be right upon the evidence.
Ib.
6. *Misconduct of Jurors. — Criminal Law. — Inspecting Locus in Quo. — Experiments.* — A new trial will be granted in a criminal case, where a number of the jurors, in the absence of, and without the consent of, either the court or the parties, went to the scene of an alleged occurrence material to the questions involved, and there made experiments, and conversed with witnesses with reference to such alleged occurrence, although they filed affidavits that their visits were for mere idle curiosity, and that their experiments and observations did not enter into their deliberations, nor control to any extent their verdict.
Conrad v. State, 290
7. *Newly Discovered Evidence. — Counter Affidavit.* — A new trial for newly discovered evidence of a witness, who testified on the former trial, is properly refused, where a counter affidavit of such witness is filed in which she states that her affidavit filed on the motion for a new trial was false, and that the testimony given by her on the trial was true.
Hire v. State, 359
8. *Newly Discovered Evidence. — Counter Affidavit.* — The trial court may allow the State, on a motion for a new trial for newly discovered evidence in a criminal action, to file a counter-affidavit at any time before the ruling on such motion.
Ib.
9. *New Matter. — Complaint. — Diligence. — Payment. — Reasonable diligence to discover the new matter relating to the payment of a judgment, upon which an action to review a judgment in a former trial, enforcing the judgment mentioned is based, is not sufficiently averred by allegations of the complaint that the plaintiffs examined the records of judgments, and inquired into the facts from every source where information was likely to be ob-*

tained, in the absence of any allegations as to inquiries of the persons alleged to have made the payments, under section 629, R. S. 1894, providing that the complaint must show that the new matter could not have been discovered, before judgment, by reasonable diligence.
Osgood v. Smock, 387

NOTICE.

See APPELLATE PROCEDURE, 19; BRIDGES, 1; CONSTITUTIONAL LAW, 2; CONVERSION, 1; DAMAGES, 5; MECHANIC'S LIEN, 2, 8; NATURAL GAS, 2; PLEADING, 14.

NUISANCE.

See INJUNCTION, 6; MUNICIPAL CORPORATION, 4, 5, 6.

NUNC PRO TUNC ENTRY.

See MUNICIPAL CORPORATION, 8.

OATH.

See CRIMINAL LAW, 5; EVIDENCE, 10.

When Regarded as Administered by the Court. — An oath administered in the presence of the court by an officer, who is incompetent, is regarded as administered by the court.

Masterson v. State, 240

OFFICE AND OFFICER.

1. *Township Trustee.—Term of Office.*—A township trustee, elected for four years in April, 1890, under Acts of 1889, page 344, fixing the commencement of the term of office in August following the election, cannot, after the election and qualification of a successor in November, 1894, under the Acts of 1893, page 192, providing that such officer shall be chosen at the general election, in November, 1894, and every four years thereafter, hold such office, under the Const., Art. 15, sections 2 and 3, prohibiting the creation of any office for a longer term than four years, and providing that the officer shall hold his office until his successor is elected and qualified.

State, ex rel., v. Wells, 231

2. *Township Trustee. — Commencement of Term of Office.* — The change of the time of election of township trustees from April to November, made by the statute, has the effect to postpone the commencement of the term from the first Monday of August, as previously fixed to the time of election and qualification of the successor of the incumbent.

Ib.

ORDINANCE.

See MUNICIPAL CORPORATION, 4, 5, 6.

PARENT AND CHILD.

See ACTION.

PARTIES.

See APPELLATE PROCEDURE, 16, 25, 31; JUDGMENT, 2.

PARTITION.

See APPELLATE PROCEDURE, 9; PLEADING, 11.

PARTITION FENCE.

Statute Construed.—The provision of the act of June 4, 1852, section 16, as amended, that if either of two adjoining owners fail to maintain his portion of the partition fence, as provided for "in the preceding section," it can be repaired by the township and the cost made a lien on his land, became ineffective when such preceding section was made void by a second amendment in violation of the constitution.
Stony Creek Tp. v. Kabel, 501

PAYMENT.

See NEW TRIAL, 9.

County.—Illegal Claim.—Payment, under an allowance of claims made by the board of county commissioners in defiance of a positive statute, is not a payment by the county, within the rule that a payment under mistake of law cannot be recovered.
Board, etc., v. Heaston, 583

PERJURY.

See CRIMINAL LAW, 5; EVIDENCE, 11.

PERSONAL PROPERTY.

See TRUST.

PLEADING.

See AMENDED PLEADING; APPELLATE PROCEDURE, 7, 12, 24; DEMURRER; EXHIBIT; NEW TRIAL, 9.

1. *Special Plea.—Estoppel.*—Facts claimed to constitute an estoppel must be specially pleaded.
Kiefer v. Klinsick, 46
2. *Complaint to Foreclose a Mechanic's Lien.—Sufficiency.*—A complaint alleging that both contractors and subcontractors purchased of plaintiffs materials for use in the construction of the building on which a lien is sought to be foreclosed, which materials were "used" in its construction, sufficiently alleges that the materials were purchased for use in the building—especially where a bill of particulars and the notice of intention to file the lien, which are made a part of the complaint, show that the materials were furnished to the contractors and subcontractors to be used in the building.
Smith v. Neubaur, 95
3. *Complaint.—Theory.*—The want of a theory does not make a complaint demurrable if it states sufficient facts to constitute a cause of action.
Scott v. Cleveland, etc., R. W. Co., 125
4. *Complaint.—Railroad.—Damages to Passenger.*—Averments that a conductor negligently and carelessly mistreated a passenger in carrying her beyond her destination and in stopping at a distance from the depot and roughly ordering and forcing her to get off, are not sufficient to constitute a cause of action, where it is not alleged that she had conformed to the rules of the company and had paid her fare, or offered to do so.
Ib.
5. *Complaint.—Railroad.—Damages to Passenger.*—Averments that a carrier's servants carelessly and negligently cause a passenger to enter a train for which she had a ticket given her by mistake,

without averment of their knowledge that she did not desire to take passage on the train indicated by the ticket she held, do not constitute a cause of action against the carrier. *Ib.*

6. *Complaint to Set Aside a Deed and Assignment.—Undue Influence.—Restoration of Consideration.*—A complaint in an action to set aside a deed and an assignment, upon the ground of undue influence and mental weakness, need not allege a restoration, or offer to restore the consideration, where the only consideration was a promise to support plaintiff for life contained in the deed, as a judgment setting aside the deed would also set aside the promise; and, besides, a provision in a deed for the support of the grantor during life cannot be specifically enforced. *Yount v. Yount, 133*
7. *Complaint.—Master and Servant.—Assumed Risk.*—A complaint by an administrator of a decedent, who was an employe in a stone-quarry yard, alleging that the decedent's death was caused by a stone falling on the decedent while in line of duty as hooker, which stone was sitting on edge on loose-made earth, and avers that the loose-made earth was liable to cause the stone to fall over, is not sufficient, where it does not appear that the loose-made earth did cause it to fall over and inflict the injury complained of. *Salem-Bedford Stone Co. v. Hobbs, Admr., 146*
8. *Complaint.—Action to Set Aside a Will.*—A complaint, in an action to set aside a will, averring generally "that said will was unduly executed," is sufficient on demurrer, notwithstanding the fact that it is followed by facts which are insufficient to avoid the will. *Wenning v. Teeple, 189*
9. *Complaint for Recovery of Purchase-price of Land.—Vendor's Lien.*—A complaint alleging a sale of land by plaintiff's intestate, in payment for which defendant drew his check payable to a given bank for the benefit of such intestate, and that such check was properly presented for payment, and was and still is due and unpaid, and asking for judgment against defendant, and that such judgment be declared a specific lien on the land, and that the land be sold in satisfaction, states a good cause of action to recover the purchase-price of land, and to have the same declared a vendor's lien on the land. *Mackey v. Craig, Admr., 203*
10. *Answer.—Written Instrument.—Exhibit.*—The original written instrument upon which an answer is based, or a copy thereof, must be filed and made part of the answer as an exhibit, under section 865, R. S. 1894, providing that when any pleading is founded on any written instrument the original or a copy must be filed therewith. *Miller v. Bottenberg, 312*
11. *Partition of Land.—Answer of the Twenty Years' Statute of Limitations.*—A plea setting up the twenty years' statute of limitations, in an action to partition land, is good as a plea of the fifteen years' statute of limitations. *Waymire v. Waymire, 329*
12. *Cross-complaint.—Judgment.—Mortgage.*—A cross-complaint in an action to foreclose a mortgage, which sets up a judgment procured against the mortgagor before the execution of the mortgage, is fatally defective on demurrer if it fails to state that such judgment is a lien on the premises sought to be foreclosed; and it is not helped in this respect by anything contained in the complaint tending to show that fact, since a cross-complaint must be complete in itself without aid from the other pleadings in the case. *Dudenhof v. Johnson, 631*
13. *Complaint.—Breach of Marriage Contract.—Presumption.—Evidence.*—Plaintiff, in an action for breach of marriage contract,

need not allege or prove defendant's capacity to enter into such contract, for such capacity will be presumed. *Tucker v. Hyatt*, 635

14. *Sustaining Demurrer to Complaint. — Action to Set Aside Fraudulent Conveyance. — Grantee's Knowledge of Fraudulent Intent.* — Improperly sustaining a demurrer to an original complaint in an action by a creditor to set aside a voluntary conveyance by his debtor, as fraudulent, because it fails to allege that the grantee had knowledge of the fraudulent intent, is not prejudicial, where, upon a trial under an additional paragraph of the complaint subsequently filed supplying such averment, it was specially found that the grantor did not make the conveyance with fraudulent intent, in view of section 401, R. S. 1894, providing that the court must in every stage of the action disregard any error not affecting a substantial right. *Gilliland v. Jones, Exr.*, 662

15. *Complaint. — Theory. — To Charge Old Railroad Company with Stock and Extend Charge to New Company. — Fraudulent Conveyance.* — That the theory of a complaint against a railroad company is not to set aside a conveyance of stock as fraudulent, but to charge the old company with such stock and dividends accrued thereon, and to extend such charge to the new company which has succeeded to the property rights of the old company, see opinion. *Citizens' St. R. R. Co. v. Robbins, Admr.*, 671

POLICE POWER.

See CONSTITUTIONAL LAW, 2; LICENSE, 4.

PRACTICE.

1. *Motion for Direction of Verdict. — Insufficiency of Evidence.* — The proper practice for a defendant, who is of the opinion that plaintiff's evidence makes no case, is not to move to withdraw the case from the jury, but to ask for direction of a verdict. *Stroble v. City of New Albany*, 695
2. *Taking Case from Jury. — Question of Negligence in Dispute.* — An action for injuries occasioned by a defective bridge should not be taken from the jury, where both the questions of negligence and contributory negligence are left in dispute. *Ib.*

PRESUMPTION.

See APPELLATE PROCEDURE, 6, 39, 45, 51; EVIDENCE, 14; INSTRUCTIONS TO JURY, 8; PLEADING, 13; SPECIAL VERDICT, 5.

PROMISSORY NOTE.

See APPELLATE PROCEDURE, 51; CORPORATION, 2; MORTGAGE, 7; VENDOR'S LIEN, 2.

PUBLIC FUNDS.

See INJUNCTION, 2, 3.

PUBLIC IMPROVEMENT.

Street. — Void Award of Contract. — The requirement of section 4288, R. S. 1894, that contracts for street improvements, for which the abutting property is ultimately liable, shall be awarded to the best bidder, is violated by the award of a contract containing provisions beneficial to the contractor, not contemplated by the form of bid supplied to bidders, and which are substantially similar to the conditions incorporated in the bid of the bidder to whom the con-

tract is awarded. although such conditions were stricken out before the acceptance of the bid. (See note at end of opinion.)

Wickwire v. City of Elkhart, 305

PUBLIC POLICY.

See CONTRACT, 1.

RAILROAD.

See CONTRACT, 5; EVIDENCE, 9; INSTRUCTIONS TO JURY, 10; PLEADING, 4, 5, 15; SPECIAL VERDICT, 1, 2; STREET RAILROAD.

1. *Passenger.—Ticket Agent.—Breach of Duty.—Union Depot.*—A railroad company whose ticket is given by mistake to a passenger in lieu of a ticket of another company which was called for, where it was bought in a union depot, of an agent who had authority to sell tickets for both companies, is not liable for the agent's mistake, since the breach of duty is that of the company whose ticket was desired. *Scott v. Cleveland, etc., R. W. Co.*, 125

2. *Rule.—Brakeman.—Authority to Eject Trespasser.*—Under the following rule of a railway company. "They [brakemen] are under the immediate orders of the conductor or yardmaster with whom they serve, and must give him every assistance in the performance of his duty. They are to ask and receive from him all instructions necessary as to their duties. In general, they are the servants and guardians of the train; to do all the work required during its trip, and protect it from danger,"—freight brakemen are not authorized to eject trespassers generally.

Lake Shore, etc., R. W. Co. v. Peterson; 214

3. *Authority of Brakemen.*—The fact that a conductor and two brakemen were in charge of and managing a train does not carry the inference that the brakemen had the authority co-equal with the conductor, or that they had any authority other than that implied from their position as brakemen. *Ib.*

4. *Failure to Give Statutory Signals.—Liability.—Contributory Negligence.*—Failure of a railroad company to give the statutory signals on approaching a crossing, does not render it liable for an injury to a traveler who drives upon the crossing without looking or listening for the approach of a train.

Miller v. Terre Haute, etc., R. W. Co., 323

5. *Negligence.—Using Cars Having Uneven Couplings or Deadwoods.*—It is not negligence for a railroad company to use cars, whether belonging to it or another company, constructed with uneven couplings or deadwoods.

Pennsylvania Co. v. Ebaugh, 687

RAPE.

See CRIMINAL LAW, 6, 9; EVIDENCE, 13.

RATIFICATION.

See MUNICIPAL CORPORATION, 2.

REAL ESTATE.

See DESCENT, 1, 2, 3; MORTGAGE, 5; PLEADING, 9; REMAINDER; VENDOR'S LIEN; WILL, 6.

RECEIPT.

See WAREHOUSEMAN, 1, 2.

RECEIVER.

See ASSIGNMENT OF ERRORS, 1, 2; MECHANIC'S LIEN, 6.

1. *Appointment by Judge While Holding Court in Another County.*—A judge of the circuit court, who is holding a session in one of the counties in his circuit, may make an order appointing a receiver in an action brought in another county, under section 1236, R. S. 1894, providing that receivers may be appointed by the court or the judge thereof "in vacation."
Chicago, etc., R. W. Co. v. St. Clair, 371
2. *Appointment After Rendition of Decree.*—A receiver may be appointed after the rendition of a decree, where occurrences arise which threaten the effectiveness of such decree. *Ib.*
3. *Action.*—There is no right of action in creditors of a corporation under receivership to enforce claims due such corporation.
Big Creek Stone Co. v. Seward, 205.

RECORD.

See AMENDED PLEADING; APPELLATE PROCEDURE, 48, 57; BILL OF EXCEPTIONS, 2, 3, 4, 5.

RECORDS IN ANOTHER CASE.

See JUDICIAL NOTICE, 1.

RECOVERY.

See CONVERSION, 2; EVIDENCE, 26; PLEADING, 9; SPECIAL VERDICT, 4.

REFORMATION OF INSTRUMENT.

See MORTGAGE.

REHEARING.

See APPELLATE PROCEDURE, 1, 40.

REMAINDER.

See WILL, 6.

RES ADJUDICATA.

See COUNTY COMMISSIONERS, 2; JUDGMENT, 4.

REVERSION.

See DESCENT, 2, 3.

SALE.

See ADMINISTRATOR'S SALE; CONTRACT, 1; MORTGAGE, 5, 6.

SCHOOL TRUSTEES.

See EVIDENCE, 1; INJUNCTION, 1, 3.

SIGNATURE.

See EVIDENCE, 27, 28, 29.

SPECIAL FINDING.

See APPELLATE PROCEDURE, 39, 50, 55.

SPECIAL VERDICT.

1. *Railroad.—Rule as to Duty of Brakemen.—Conclusion of Law.*—In an action against a railroad company, a special finding as to the

existence of a rule of the company relating to the duties of brakemen, is the statement of a fact upon which the court could determine, as a question of law, whether authority had been given the brakeman to eject a trespasser on the train, and such determination would not infringe any prerogative of the jury.

Lake Shore. etc., R. W. Co. v. Peterson, 314

2. *Railroad. — Authority of Brakeman.* — In such case, if the finding had been that the brakeman had or had not authority to eject the trespasser, such finding would have stated the limit of the issue, both as a question of fact and one of law, and would be objectionable. *Ib.*

3. *Defective. — Venire de Novo. — Evidentiary Facts.* — A special verdict, which finds the evidentiary facts in place of the inferential facts pleaded, on which such evidentiary facts are based, is insufficient as a basis for judgment, although the evidentiary facts found are sufficient to justify a finding of such inferential facts, and a trial *de novo* should be granted.

Boyer v. Robertson, 604

4. *Recovery. — Burden of Issue. — Essential Facts.* — The party having the burden of the issue cannot recover, unless the special verdict finds all the facts essential to a recovery. *Ib.*

5. *Evidentiary Facts. — Presumption.* — If the jury simply find the evidence of facts essential to a recovery instead of the facts themselves, the presumption which arises on a failure to find essential facts does not obtain; but the verdict is defective and a *venire de novo* should be granted. *Ib.*

SPECIFIC PERFORMANCE.

See CONTRACT, 2.

STARE DECISIS.

See COURTS, 5.

STATE BONDS.

See DAMAGES, 3.

STATUTE.

See APPORTIONMENT LAW.

Amendment of Section Previously Amended. — Void. — An act purporting to amend a section of an act which has previously been amended is unconstitutional and void.

Stoney Creek Tp. v. Kabel, 501

STATUTE CONSTRUED.

See BRIDGES, 1; CONSTITUTIONAL LAW, 2; CRIMINAL LAW, 8;

DESCENT, 3; PARTITION FENCE; WILL, 5.

Change of Construction. — Effect on Vested Rights. — Courts. — The interpretation placed by the supreme court at the time of an administrator's sale of land for payment of debts, upon sections 2483, 2487, R. S. 1881, that a childless widow whose husband left children by a former wife took only a life estate in one-third of his lands, which interpretation was accepted by the court and all the parties to the proceeding, will be adhered to in determining the validity of such sale in a subsequent action to partition the land, notwithstanding a subsequent interpretation that it gives an estate in fee simple to such widow. *Meyers v. Boyd, 496*

STATUTE OF LIMITATIONS.

See PLEADING, 11.

STREET RAILROAD.

See MORTGAGE, 3.

STREETS.

See LICENSE, 1, 2, 3, 4, 5; PUBLIC IMPROVEMENT.

SUBPOENA.

See CONTINUANCE, 1, 2, 4.

SUPERIOR COURT.

1. *Circuit of Three Counties. — Place of Holding Court. —* A statute creating a superior court for three designated counties, and providing that it shall hold its sessions for each county in the town or city other than the county seat containing 4,000 or more inhabitants, taken according to the census for a given year, and that if either county should not have such a town or city, the court should be held at the county seat, is not invalid on the ground that it leaves the place of holding the court undetermined, where two of such counties have each one such city and the third county has none. *Woods v. McCoy, 316*
2. *Jurisdiction. — Statute, Constitutionality. —* The creation of a court for three designated counties, having concurrent jurisdiction, in certain cases, with the circuit court of such counties, does not violate the State Const., article 7, section 1, as amended March 14, 1881, vesting the judicial power of the State in a Supreme Court, circuit courts, and "such other courts" as the general assembly may establish. *Ib.*

SURETIES.

See MORTGAGE, 4.

SURETYSHIP.

See MARRIED WOMAN.

SURPLUSAGE.

See APPELLATE PROCEDURE, 7.

SURVEY.

See EVIDENCE, 19.

TAXES.

1. *County Board of Review. — Time of Legal Expiration of Session. — How Computed. —* The rule for the computation of time fixed, by section 1304, R. S. 1894, excluding the first and including the last day, unless the last day be Sunday, when it shall be excluded, governs in determining the legal expiration of the session of the county board of review, which, by section 8533, is limited to eighteen days, and, therefore, intervening Sundays must be included. *Yocum, Aud., v. First Natl. Bank, etc., 272*
2. *County Board of Review. — Void Order. —* An order of the county board of review of taxation, made after its legal session, as fixed by section 8533, R. S. 1894, had ended, is void. *Ib.*

3. *Payment or Tender of Payment of Taxes Due.—Injunction.*—The payment or tender of payment of taxes admitted to be due, upon the basis of the original valuation of the capital stock of a bank, is not a condition precedent to an action to annul an order by the county board of review, under the statute, increasing the previous valuation, where the attack is directed against the increase as an entirety. *Ib.*
4. *State Board.—Express Companies.*—The State board of tax commissioners is not confined for its information as to the value of the property of an express company, to the statements furnished by them as provided by statute, but may resort to such other information as they have or are able to obtain. *State v. Adams Ex. Co., etc., 549*
5. *State Board.—Unit System.—Routes of Companies.*—In assessing express companies the statute authorizes the State board of tax commissioners to use the unit system of valuation, and in so doing the length of the routes and the proportion of such length within the State may be taken into consideration. *Ib.*
6. *Unit System of Valuation.*—The object of the unit system of assessment is to prevent destruction of values by disruption and disintegration, and therefore the whole property used in the business is first valued, which necessarily includes all the local properties, and then so much of the whole value thus ascertained is apportioned to this State as its amount and value bears to the amount and value of the whole property. *Ib.*
7. *Express Companies.—Right to Assess Routes.*—The length of a route of an express company has a bearing on the earning capacity of the property employed in the business, and the earning capacity determines the value of such property. Hence an assessment on the route of the company within the State under the unit system was proper and right. *Ib.*

TAX PAYER.

See INJUNCTION, 2.

TENANTS BY ENTIRETIES.

See DEED, 1; ESTOPPEL, 1.

THEORY.

See PLEADING, 8, 15; NEW TRIAL, 8.

TOWNSHIP TRUSTEE.

See OFFICE AND OFFICER, 1, 2.

TRESPASS.

See EVIDENCE, 25.

TRESPASSER.

See EVIDENCE, 9.

TRIAL.

See BILL OF EXCEPTIONS, 1; VERDICT, 3.

1. *Jury.—Taking Indictment to Jury Room.*—It is proper for the court to permit the jury to take the information with them upon retiring to deliberate upon the verdict. *Masterson v. State, 240*

2. *Evidence.—Criminal Law.—Admitting Original Evidence After Defendant has Closed.—Discretion.*—The trial court may, in its discretion, permit original testimony to be given for the State in a criminal case after defendant has closed his evidence.

Hire v. State, 359

3. *Excluding Juror.—Criminal Law.*—It is not too late to exclude a juror in a criminal case after the jury has been sworn.

Douthitt v. State, 397

TRUST.

Husband and Wife.—Personal Property of Wife.—Common Law Rule.—No resulting trust can arise in favor of a married woman in land purchased with her money by her husband in his own name, prior to the passage of the act of July 24, 1853, changing the common law rule, that the personal property of a wife belongs to her husband.

Waymire v. Waymire, 329

UNSOUNDNESS OF MIND.

See WILL, 5.

VENDOR'S LIEN.

See CHATTEL MORTGAGE; PLEADING, 9.

1. *Action to Foreclose, Where Brought.*—An action to foreclose a vendor's lien is properly brought, under section 808, R. S. 1894, in the county where the land is situated. *Mackey v. Craig, Admr., 203*
2. *Reservation in Note.*—Where A sold land to B, taking a note for \$2,700 in part payment, and subsequently C sold land to A and agreed to take B's note in part-payment, if it were a purchase-money note, and B thereupon executed a note to C for the amount of the unpaid purchase-price of the sale to A, and another note to A for the balance of the \$2,700 due A on the purchase by B, the note by B to C carried a vendor's lien on the land sold to B by A.

Upland Land Co. v. Ginn, 434

VENIRE DE NOVO.

See SPECIAL VERDICT, 3.

VERDICT.

See CRIMINAL LAW, 12; DAMAGES, 2; PRACTICE, 1; SPECIAL VERDICT; WILL, 2.

1. *When Responsive to Issues.—Drainage.*—A verdict in the circuit court on the trial *de novo* of proceedings to open a public ditch, that the jury find for the petitioners, and that the proposed ditch will be of practical utility and conducive to public health, and that the assessments in the viewers' reports are in proportion to the benefits derived, and that no damages should be allowed a specified person—is responsive to the issues allowed by section 5671, R. S. 1894, authorizing an appeal to be taken. *Wilson v. Talley, 74*
2. *Court Directing Verdict.—Failure of Evidence.—Trial.*—A verdict is properly directed for defendant where the evidence introduced utterly fails to establish the cause of action stated in the complaint. *Mayer, Admr., v. Manhattan Life Ins. Co., 439*

WAIVER.

See APPELLATE PROCEDURE, 27, 29, 30, 37; MORTGAGE, 5.

WAREHOUSEMAN.

See CRIMINAL LAW, 8.

1. *Receipt—Statutory Requirement.—Estoppel.*—A warehouseman cannot claim, in a prosecution under sections 8726, 8728, R. S. 1894, for disposing of goods for which a receipt has been given, without the consent of the holder thereof, that the paper given by him, and acknowledging on its face the receipt of goods for storage, does not conform to the requirements of the statute. *Miller v. State, 401*
2. *Receipt.—Sufficiency Of.*—A receipt by a warehouseman, in the following form: "Received of J. T. 126 bu. 20 lbs. wheat, test 59 wt. at stored per bushel. Fire and heating at owner's risk," is in substantial compliance with section 8721, R. S. 1894, requiring every warehouseman to give a receipt on demand of any person from whom he receives goods, setting forth the "brand, quality, kind, and description thereof," to be designated by some mark. *Ib.*
3. *Mixing and Selling Bailed Goods.—Liability.—Criminal Law.*—A warehouseman cannot, under section 8726, R. S. 1894, mix wheat received by him for storage with other wheat in his warehouse and sell the mixture in the course of business, without the written consent of the holder of a receipt therefor given by him, or the surrender of such receipt. *Ib.*

WAREHOUSE RECEIPT.

See EVIDENCE, 20.

WILL.

See EVIDENCE, 24; INSTRUCTIONS TO JURY, 5, 6, 7, 8; PLEADING, 8.

1. *Interest of Joint Tenant not Descendible.*—The interest of a joint tenant not being descendible, such tenant has no right or power, under section 2726, R. S. 1894 (section 2556, R. S. 1881), to devise the same by will. *Wilkins v. Young, 1*
2. *Testamentary Capacity.—Evidence.—Verdict.*—A verdict that one was without testamentary capacity cannot rest upon the opinions of witnesses for the contestant that testator's mind was not very sound, where it appears from other parts of contestant's evidence that he had mind enough to know the extent and value of all his property, the names of those who might or ought to be the natural objects of his bounty, and was able to hold them in mind long enough to dictate and have his will prepared. *Rarick v. Ulmer, by next Friend, 25*
3. *From Husband to Wife.—Reputed Wife a Married Woman at Time of Second Marriage.*—If a husband make provision in his will for his reputed wife, the fact that his reputed wife, at the time of her marriage to him, had a husband living from whom she had not been divorced will not avoid the will as to such wife. *Wenning v. Teeple, 189*
4. *Election by Widow.*—The failure of a widow to affirmatively elect within a year after probate of the will to accept the provision made by law, as required by section 2666, R. S. 1894, will be deemed an election to accept the provisions made by the will in place of the provisions by law. *Archibald v. Long, Exr., 451*
5. *"Unsoundness of Mind," Meaning Of.—Statute Construed.—Instructions.*—The expression "of unsound mind" as used in the Indiana statute of wills, means such a degree of unsoundness of

mind as incapacitates one from making a will according to the standard fixed by the adjudicated cases for testamentary capacity. (For instructions as to "unsoundness of mind," see opinion.)

Blough v. Parry, 463

6. *Devise of Real Estate. — Life Estate. — Remainder.* — A clause in a will devising to testator's daughter certain real estate "for and during her natural life as a life-estate, and not in fee, at her death to go to her children in fee simple. If any child of hers shall have died leaving a child or children, then the portion of said real estate, that would have gone to the parent, shall go to such child or children,"—vests in the children of such daughter an estate in remainder, which takes effect immediately upon the death of the testator, the enjoyment thereof being postponed until after the death of their mother.

Moore v. Hare, 573

WITNESS.

See COUNTY, 1, 2, 3, 4, 5.

1. *Nonexpert. — Insanity.*—Insanity or unsoundness of mind cannot be proved by a nonexpert witness unless he first gives the facts upon which his opinion is based.
Rarick v. Ulmer, by Next Friend, 25
2. *County Assessor. — Drainage.*—A county assessor who is also a viewer in proceedings to construct a public ditch, is competent to testify as to the value of lands to be affected by the proposed drainage.
Wilson v. Talley, 74
3. *Impeachment by Statements Made Out of Court.*—The right to impeach a witness by statements made out of court lies only where such statements are contrary to the testimony of the witness in court relative to material matter in issue.
Blough v. Parry, 463
4. *Impeachment. — Negative Answer. — Cross-Examination.* — If a party recall a witness ostensibly for the purpose of further cross-examining him, and puts a question not proper in cross-examination, but eliciting evidence in chief, for the purpose of proving such fact she was such party's witness, and upon giving a negative answer such party has no right to impeach the witness by statements made out of court, as the testimony of the witness, though not beneficial, is not prejudicial.
Ib.
5. *Testamentary Capacity. — Cross-Examination.*—Where a witness has testified to the testator's mental unsoundness and to testator's specific acts towards him, the witness may be cross-examined in explanation of such acts and treatment by the testator.
Ib.

6. 111.

THE END OF VOLUME 144.

